DOCKET

SHOW PROCEEDINGS AND ORDERS DATE: [03/09/88]

CASE NBR: [86102070] [CFX] CASE STATUS: [ ]
SHORT TITLE: [Kamen, Jill S.]
VERSUS [Nordberg, Judge, USDC ND IL] DATE DOCKETED: [062487]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Jun 24 1987		Petition for writ of certiorari filed.
Jul 20 1987		Brief of respondent Kemper Financial Services in opposition filed.
Jul 22 1987		DISTRIBUTED. September 28, 1987
Jul 23 1987		Waiver of right of respondent Cash Equivalent Fund to respond filed.
Jul 28 1987		Reply brief of petitioner Jill S. Kamen filed.
Dec 17 1987		Supplemental brief of respondent Kemper Financial Services filed.
Feb 22 1988		REDISTRIBUTED. February 26, 1988
Feb 29 1988		REDISTRIBUTED. March 4, 1988
Mar 7 1988		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

No. 86-2070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JILL S. KAMEN,

Petitioner,

vs.

HONORABLE JOHN A. NORDBERG, United States District Judge of the District Court for the Northern District of Illinois, Eastern Division (KEMPER FINANCIAL SERVICES, INC. and CASH EQUIVALENT FUND, INC., real parties in interest),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Question Presented for Review

Should the Court of Appeals grant mandamus to protect the constitutional right to jury trial where that right has been improperly denied?

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Opinions Below

Neither the decisions of the Court of Appeals nor of the District Court are reported.

Jurisdiction

The decision of the Seventh Circuit was dated and filed April 13, 1987. A timely petition for rehearing *en banc* was denied May 19, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Constitutional and Statutory Provisions Involved

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

Due to their length, Sections 20(a), 36(b) and 44 of the Investment Company Act of 1940, 15 U.S.C. Sections 80a-20(a), 80a-35(b) and 80a-43, are set forth in the appendix at 43a-46a.

Statement of the Case

Petitioner is a shareholder of defendant Cash Equivalent Fund, Inc. (the "Fund"), an open-end investment company or mutual fund registered under the Investment Company Act of 1940. She has brought the action on behalf of the Fund against its investment adviser (the "Adviser").*

The action is brought under Sections 20(a) and 36(b) of the Investment Company Act. In short, Section 20(a) proscribes the fraudulent solicitation of proxies with respect to a registered investment company, and Section 36(b) provides that the investment adviser of a registered investment company owes it a fiduciary duty with respect to the compensation which the company pays the adviser. For breach of that fiduciary duty, the SEC, or a security holder on behalf of the investment company, may bring suit against the adviser.

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* *Kamen* v. *Kemper Financial Services, Inc.*, No. 85 C 4587 (N.D. Ill.). Jurisdiction of the District Court was invoked under Sections 36(b) and 44 of the Act, 15 U.S.C. Sections 80a-35(b) and 43 respectively.

Section 36(b)(3) provides for an action to recover "the actual damages resulting from the breach of fiduciary duty . . .", and Section 44 refers to both suits in equity and actions at law under Section 36(b). The complaint herein alleges that the compensation of the Adviser is excessive and that the proxy statement soliciting shareholder approval of the advisory agreement was false and misleading. It seeks damages only.

Plaintiff's jury demand was endorsed upon the face of the complaint. Defendants moved to dismiss plaintiff's claim of proxy fraud, and to strike plaintiff's demand for a jury trial. The District Court granted defendants' motion to dismiss the proxy fraud claim on the ground that plaintiff had failed to justify the absence of a demand upon the Fund directors to institute suit to recover for that claim. With respect to the Section 36(b) claim, the District Court struck plaintiff's jury demand on the grounds that "the action is essentially in equity and therefore not covered by the Seventh Amendment."

Plaintiff's motion for reconsideration was denied, whereupon she promptly sought mandamus in the Court of Appeals. The Court of Appeals denied the petition for mandamus without any opinion other than to cite *First National Bank of Waukesha* v. *Warren*, 796 F.2d 999 (7th Cir. 1986). In *Waukesha* the Seventh Circuit held that mandamus was not available to review the striking of a jury demand unless the denial of the jury right was irreparable upon appeal from a final judgment. Petitioner filed a petition for rehearing and suggestion of rehearing *en banc*, which was denied.*

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* Subsequent to the panel decision, Judge Flaum recused himself, withdrew his vote and did not participate in the consideration of the request for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

A. *The Court of Appeals Decision Conflicts With Applicable Decisions of This Court.*

In *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), this Court granted certiorari to review the denial of a writ of mandamus by the Ninth Circuit, which had held that the trial judge had acted within his proper discretion in denying petitioner's request for a jury. 359 U.S. at 501. The Court reversed, stating:

> "Whatever differences of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled." 359 U.S. at 511 [footnote, citing authorities, omitted].

In *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962), this Court again reversed the denial of mandamus to vacate an order striking petitioner's demand for a jury trial. The Court referred approvingly to the decision in *Beacon Theatres* as one which "emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury . . ." 369 U.S. at 472.

The Seventh Circuit seeks to limit the application of the principle enunciated in *Dairy Queen* and *Beacon Theatres* to cases which involve both legal and equitable claims, on the theory that such a mixture renders denial of the jury right potentially irreparable upon appeal. *Waukesha, supra*, 796 F.2d at 1004-6. However, as noted in the dissent in *Waukesha*, 796 F.2d 1006 at 1007, this Court's mandate for issuance of the writ where jury trial is denied is hardly dependent on the mixing of legal and equitable claims. Rather, it flows from the Court's holding

in *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935), *quoted in*, *Beacon Theatres*, 359 U.S. at 501:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

Indeed, it would be truly incongruous to imagine that petitioner could enhance her right to a jury trial by adding an equitable claim to her legal claims. Accordingly, it is not surprising that the courts have held, as in *In re Zweibon*, 565 F.2d 742, 745-46 (D.C. Cir. 1977):

> "In the opposition to the petition . . . the Government argues that mandamus is not available to review the order of a District Court refusing a jury trial where the case presents only legal (as opposed to a combination of legal and equitable) issues. . . . Rather, we find that, where denial of a trial by a jury is alleged to be improper, the claimed factual and legal bases for denial may be reviewed on mandamus, whether the complaint presents only issues triable at law or issues triable both at equity and at law. *Bereslavsky* v. *Caffey*, 161 F.2d 499 (2d Cir.), *cert. denied*, 332 U.S. 770, 68 S. Ct. 82, 92 L. Ed. 355 (1947) (amended complaint raised only issues triable at law; mandamus issued); *see Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 511 & n.20, 79 S. Ct. 948, 957, 3 L. Ed. 2d 988 (1959) (citing *Bereslavsky, supra*, to support conclusion, 'we think the right to grant mandamus to require jury trial where it has been improperly denied is settled'). We therefore conclude that this denial of a jury trial may be reviewed on a petition for a writ in the nature of mandamus." (footnote omitted)

Nor does the right to mandamus to protect the jury right depend upon ease of resolution, as the Seventh Circuit would have it (*Waukesha, supra,* at 1006). As the Court of Appeals held in *Filmon Process Corp.* v. *Sirica,* 379 F.2d 449, 450-51 (D.C.Cir. 1967):

> ". . . on an application for an extraordinary writ for pre-trial relief the Supreme Court expects the courts of appeals to make a determination whether or not there is a right of trial by jury, regardless of whether the question is a close or complicated one, and that the Court would not welcome a doctrine whereby a party's constitutional right to jury trial was trammeled in fact because a court of appeals determined that the issue was doubtful and that it need not and would not decide whether or not the party had the right of trial by jury."

B. *The Decision of the Court of Appeals Conflicts With Decisions of Other Courts of Appeals as Well as With a Decision of a Different Panel of the Seventh Circuit.*

As almost *every* circuit has held, "[m]andamus is the accepted method to review an order denying a claimed right of trial by jury." *Maldonado* v. *Flynn,* 671 F.2d 729, 732 (2nd Cir. 1982). *See also, In re Union Nacional de Trabajadores,* 502 F.2d 113, 115-16 (1st Cir. 1974), *vacated on other grounds,* 527 F.2d 602 (1975); *Lee Pharmaceuticals* v. *Mishler,* 526 F.2d 1115, 1116 (2nd Cir. 1975); *Goldman, Sachs & Co.* v. *Edelstein,* 494 F.2d 76, 78 (2nd Cir. 1974); *E.E.O.C.* v. *Corry Jamestown Corp.,* 719 F.2d 1219, 1225 (3rd Cir. 1983); *Eldredge* v. *Gourley,* 505 F.2d 769 (3rd Cir. 1974); *General Tire & Rubber Co.* v. *Watkins,* 331 F.2d 192, 194 (4th Cir.), *cert. denied,* 377 U.S. 952 (1964); *Black* v. *Boyd,* 248 F.2d 156, 160 (6th Cir. 1957); *In re Vorpahl,* 695 F.2d 318, 319 (8th Cir. 1982); *Owens-Illinois, Inc.* v. *U.S. District Court,* 698 F.2d 967, 969 (9th Cir. 1983); *Myers* v. *U.S. District Court for the District of Montana,* 620 F.2d 741, 744 (9th Cir. 1980); *In re Zweibon,* 565 F.2d 742, 745 (D.C. Cir. 1977); *Filmon Process Corp.* v. *Sirica,* 379 F.2d 449, 450-51 (D.C. Cir. 1967).

Indeed, a different panel of the Seventh Circuit stated, in *Timberlake* v. *Oppenheimer & Co., Inc.,* 729 F.2d 515, 519 (7th Cir. 1984) (dictum), ". . . the erroneous denial of a demand for a jury trial can be corrected immediately by asking for a writ of mandamus . . .". See generally, Wright, Miller, Cooper and Gressman, *Federal Practice and Procedure,* §3935 (1977 and 1986 supp.).

In short, until the Seventh Circuit's recent decision in *Waukesha, supra,* adopted here, the virtually unbroken line of decisions from the courts of appeals was that mandamus was the proper method to review the denial of the constitutional right to a jury trial regardless of whether the question was a close or complicated one (*Filmon Process Corp.* v. *Sirica, supra*), and regardless of whether the complaint presented only issues triable at law or issues triable both at equity and at law (*In re Zweibon, supra*).

C. *The Deprivation of Petitioner's Constitutional Right to a Jury Trial Involves a Question of Exceptional Importance.*

This court has long recognized that the right to trial by jury is a basic and fundamental element of federal jurisprudence. *Simler* v. *Conner,* 372 U.S. 221, 222 (1963); *Bailey* v. *Central Vermont R. Co.,* 319 U.S. 350, 354 (1943).

In the present case the petitioner's right to a jury trial is clear. The statute, Section 36(b)(3), permits a shareholder to sue for "damages or other relief". Here the petitioner has sought damages only; no equitable relief is prayed for. An action for damages is the prototype of an action at law, in which the Seventh Amendment gives each party the right to trial by jury. *Atlas Roofing Co.* v. *Oc-*

cupational Safety Commission, 430 U.S. 442, 454 (1977) ("the Seventh Amendment [is] applicable to private damages suits in federal courts . . ."); *Pernell* v. *Southall Realty*, 416 U.S. 363, 370 (1974) ("actions for damages to a person or property are actions at law triable to a jury"); *Curtis* v. *Loether*, 415 U.S. 189, 196 (1974) (damages are "the traditional form of relief offered in the courts of law") (footnote omitted); *Ross* v. *Bernhard*, 396 U.S. 531, 533 (1970) ("The Seventh Amendment * * * entitled the parties to a jury trial in actions for damages to a person or property. . . .").

Section 44 of the Act, upon which jurisdiction of this action is based, confers jurisdiction upon Federal District Courts over "all suits in equity and actions at law brought to enforce any liability or duty created by" the Act. The Section thus draws the traditional distinction between a suit in equity and an action at law. With specific reference to Section 36(b), Section 44 goes on to provide "the [Securities and Exchange] Commission may intervene as a party in any *action or suit* to enforce any liability or duty created by, or to enjoin any non-compliance with, Section 36(b) of this title at any stage of such *action or suit* prior to final judgment therein." (emphasis and interpolation supplied). Congress thus recognized in Section 44 that a shareholder's claim under Section 36(b) could be either a legal action (if it sought damages) or an equitable suit (if it sought equitable relief).

Because the Court of Appeals refused to entertain the petition for mandamus, we have only the views of the District Court on the jury trial question. The District Court relied upon *In re Gartenberg*, 636 F.2d 16 (2nd Cir. 1980), *cert. denied*, 451 U.S. 910 (1981), in which the Second Circuit was careful to limit its decision to cases in which, unlike the present, equitable relief was sought; and upon *In re Evangelist*, 760 F.2d 27 (1st Cir. 1985),

in which the First Circuit relied upon language in the legislative history rather than in the statute itself to conclude that the action was basically equitable in nature.

In *Ross* v. *Bernhard*, 396 U.S. 531 (1970) the plaintiff, suing derivatively, contended that the adviser-broker of an investment company "extract[ed] excessive brokerage fees from the corporation"; *Id.* at 531 (interpolation supplied). This Court held that the corporation, and thus the plaintiff, was "entitled to a jury's determination, at a minimum, of its damages against its broker under the brokerage contract . . ." *Id.* at 542. Similarly, the petitioner here is entitled to a jury's determination of the Fund's damages against the Adviser under Section 36(b).*

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* The dismissal of petitioner's proxy fraud claim by the district court was palpably erroneous under the standards enunciated by the Seventh Circuit in *Nussbacher* v. *Continental Illinois Nat'l. Bank & T. Co.*, 518 F.2d 873 (7th Cir. 1975), *cert. denied*, 424 U.S. 928 (1976). However, because such dismissal was not a final decision, review thereof appears to be precluded now even though it effectively serves to cut off another avenue to jury trial.

CONCLUSION

The petition for a writ of certiorari should be granted and the order below should be reversed.

Dated: New York, New York
June 18, 1987

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APPENDIX

Memorandum Opinion and Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 85 C 4587—Judge John A. Nordberg

JILL S. KAMEN,

Plaintiff,

v.

KEMPER FINANCIAL SERVICES, INC., and
CASH EQUIVALENT FUND, INC.,

Defendants.

MEMORANDUM OPINION AND ORDER

The plaintiff, Jill Kamen, is a shareholder in Cash Equivalent Fund, Inc. ("the Fund"), a money market mutual fund managed and administered by Kemper Financial Services, Inc. ("KFS"). Plaintiff instituted this shareholder's derivative action pursuant to the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* ("ICA" or "the Act"), challenging the fees charged by KFS for managing and administering the Fund. She alleges that KFS solicited a misleading proxy in violation of § 20(a) of the Act, 15 U.S.C. § 80a-20(a), and that KFS' excessive fees constitute a breach of its fiduciary duty in violation of

§ 36(b) of the Act. 15 U.S.C. § 80a-35(b).[1] Defendants move to dismiss plaintiff's § 20(a) claims for failure to state a cause of action and for failure to make a demand on the Board of Directors as required by Fed.R.Civ.P. 23.1; and to strike plaintiff's jury demand. For the following reasons, the court grants the motions to dismiss and to strike the jury demand.

Factual Allegations

The facts, as alleged in the complaint,[2] are as follows. The Fund is a diversified open-end investment company registered with the Securities and Exchange Commission under the ICA. It invests in a range of short-term money market instruments with maturities of one year or less. The Fund commenced operations on March 16, 1979, and, as of April 23, 1985, its total assets were approximately $4.683 billion.

KFS has acted as the Fund's investment adviser, manager, primary administrator and underwriter since the Fund's inception. In exchange for its services, KFS receives monthly fees paid under two separate agreements. The investment management agreement provides for an investment management fee calculated at the annual rate of .22 of 1% of the first $500 million of the combined average daily net assets of the portfolios managed by KFS, .20 of 1% of the next $500 million, .175 of 1% of the next $1 billion, .16 of 1% of the next $1 billion and

[1] This court has jurisdiction pursuant to § 44 of the Act, 15 U.S.C. § 80a-43.

[2] On a motion to dismiss, the court must accept all well pleaded facts as true, and must make all reasonable inferences in the light most favorable to the plaintiff. *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957); *City of Milwaukee* v. *Saxbe*, 546 F.2d 693, 704 (7th Cir. 1976).

.15 of 1% of average daily net assets of such portfolios over $3 billion. The administration, shareholder services and distribution agreement ("administration agreement") provides for an annual fee, payable monthly, on a basis of .33% of the first $500 million of average daily net assets, .30% of the next $500 million, .275% of the next $1 billion, .265% of the next $1 billion, and .25% of average daily net assets over $3 billion.

The Fund has experienced tremendous success in attracting shareholder funds in the past several years, which has caused a significant increase in the total fees payable to KFS under the two separate agreements. For the fiscal year ended July 31, 1984, the Fund paid KFS nearly $20 million in fees.[3]

The essence of plaintiff's complaint is that these fees are excessive, given the nature of the Fund and the services performed by KFS. Plaintiff alleges that, unlike other mutual funds, the management of the assets of a money market fund "does not require the detailed analysis of industries nor of complex industrial companies and the concomitant retention of a large staff of highly paid and sophisticated securities analysts [because] the assets of the Fund are . . . invested in a relatively concentrated manner in fixed income obligations maturing in one year or less." (Compl. ¶9).[4] Despite the huge growth of the

[3] Kamen filed a supplemental complaint on December 8, 1986. This complaint alleges that the Fund's Board of Directors amended KFS' administration agreement in November of 1986 to substantially increase the fees paid to KFS.

[4] Paragraph 14 alleges:

> Because of the limited number, nature and variety of the Fund's investments, the investment decisions of the Fund can be made by a single person, or, at most, a handful of persons. The research and advisory activities of KFS are merely rou-

(footnote continued on following page)

Fund and the manner in which it is serviced, the fee structure has remained the same since December 1, 1981, when the fees were increased by virtue of the administration agreement. According to Kamen, the increased compensation paid to KFS resulting from the enormous increase in Fund assets is disproportionate to the services rendered by it. These allegations form the basis of Kamen's excessive fee claim under § 36(b) of the Act, 15 U.S.C. § 80a-35(b).

Kamen also alleges that KFS violated § 20 of the ICA, 15 U.S.C. §80a-20, which proscribes the solicitation of misleading proxies in connection with a security of a registered investment company.[5] In addition to the Fund, KFS

(footnote continued from previous page)

tine and administrative in nature, do not require any significant expertise or investment acumen, are performed (and were performed prior to the formation of the Fund) by KFS for other of its accounts, and consist principally of purchasing and 'turning over' money market instruments with a limited number of institutions. The incremental cost to KFS of performing these services for the Fund is minimal. In short, the investment advice provided by KFS is not worth the fees paid for that advice by the Fund and has not been worth the fees paid during the period covered by this complaint. Other advisers performed and have performed similar or superior services for lesser rates.

[5] 15 U.S.C. § 80-20(a) provides in pertinent part:

It shall be unlawful for any person, by use of the mails or any means of instrumentality of interstate commerce or otherwise, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect to any security of which a registered investment company is the issuer in contravention of such rules and regulations of the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 20a-1 renders the rules and regulations promulgated by the SEC pursuant to § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n, applicable to misleading proxy claims under § 20(a) of the ICA. 17 C.F.R. 270.20a-1.

also acts as an investment manager to the Kemper Money Market Fund, Inc. ("MM"), a money market fund which is similar to the Fund in size, number of shareholders, and investment objective. MM and the Fund have some common directors, and require substantially the same services from KFS. According to Kamen, despite this similarity in size and objective, KFS exacts substantially greater fees from the Fund than it does from MM and many of its other clients.[6]

Kamen further alleges that, on or about September 12, 1984, KFS caused a proxy statement to be distributed to the shareholders for the annual meeting of shareholders scheduled for November 8, 1984. One of the purposes of the meeting was to obtain shareholder approval for the continuance of the investment management agreement with KFS. The proxy statement seeking shareholder approval of the investment management agreement compared the fees that KFS received from other investment companies to those paid by the Fund. Kamen alleges that, although the proxy correctly compared the services rendered to the Fund to those rendered to MM, it "misleadingly" described MM's fees as a maximum fee of .50 of -% of the first $215 billion, with lesser rates on additional assets." This "misleading" description gave the false impression that MM's fees were as high or higher than those paid by the Fund, when KFS knew that the opposite was actually true. The proxy solicitation was successful, and KFS obtained shareholder approval for continuation of its investment management agreement with the Fund.

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[6] Kamen alleges that in the Fund's expenses in the year ended July 31, 1984 .72% of its average net assets, while MM's expenses were only .53% of its average net assets. As a result, the Fund's yield for the year ended September 30, 1984 was approximately 21 basis points less than that of MM. (Compl. ¶ 12).

As the above allegations clearly demonstrate, the thrust of Kamen's § 20(a) claim is that KFS disseminated misleading proxies in order to obtain continued shareholder approval for allegedly exorbitant fees. KFS' motion to dismiss concerns only the § 20(a) claims. It urges dismissal of this claim on two grounds: first, because Kamen failed to make a demand on the Fund's directors, as required by Fed.R.Civ.P. 23.1; and second, because § 36(b) of the Act provides the exclusive remedy for excessive fees. For the following reasons, the court finds that, although the complaint properly alleges a cause of action under § 20(a), it must be dismissed because Kamen failed to comply with the demand requirements of Rule 23.1.

Claims Under § 20 of ICA

KFS argues that ¶ 13 of the complaint, which alleges violations of § 20(a) of the ICA, 15 U.S.C. § 80a-20(a), must be dismissed because § 36(b) provides the exclusive remedy for shareholder claims alleging excessive fees. Section 20(a) of the ICA forbids the dissemination of misleading information in proxies solicited from mutual fund shareholders. Section 36(b) of the Act, which was passed in 1970,[7] authorizes a shareholder's suit to recover excessive fees from a fund's investment adviser. Congress added this section in order to remedy the fact that the Act, as originally passed, failed to "provide any mechanism by which the fairness of management contracts [between a fund and its adviser] could be tested in court." S.Rep. No. 91-184, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong.&Admin. News 4897, 4901. Section 36(b)

[7] Section 20(a) was part of the original Investment Company Act passed in 1940.

creates a fiduciary duty on the part of the adviser "with respect to compensation for services or other payments paid by the fund . . . to the advisers," *id.*, and authorizes shareholders to sue for breach of that fiduciary duty. *See generally Daily Income Fund, Inc.* v. *Fox*, 104 S.Ct. 831 (1984).

Prior to the passage of § 36(b), the Second Circuit had recognized an implied cause of action under the ICA for misleading proxy statements. *See Brown* v. *Bullock*, 194 F.Supp. 207, 231-34 (S.D.N.Y.), *aff'd*, 294 F.2d 415, 420-21 (2d Cir. 1961).[8] It continued to recognize an implied cause of action for § 20(a) claims unrelated to allegations of excessive fees after the passage of the 1970 amendments. *Tannenbaum* v. *Zeller*, 552 F.2d 402 (2d Cir.), *cert. denied*, 434 U.S. 934, 98 S.Ct. 421 (1977); *Galfand* v. *Chestnutt Corp.*, 545 F.2d 807 (2d Cir. 1976); *Rosenfeld* v. *E.R. Black*, 445 F.2d 1337 (2d Cir. 1971). In *Fogel* v. *Chestnutt Corp.*, 668 F.2d 100, 112 (2d Cir. 1981), *cert. denied*, 459 U.S. 828, 103 S.Ct. 65 (1982), however, the court noted in dictum that § 36(b) may constitute a shareholder's exclusive remedy for his claims of excessive fees.

Although some district courts seized on the language in *Fogel* to disallow implied claims for excessive fees under the ICA,[9] a recent decision has recognized a claim under § 20(a) of the ICA in a situation involving facts very similar to the case at bar. In *Schuyt* v. *Rowe Price Prime Re-*

[8] All of the cases discussing an implied right of action under § 20(a) have arisen in the Second Circuit.

[9] *See, e.g., Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 528 F. Supp. 1038, 1067 (S.D. N.Y. 1981), *aff'd*, 694 F.2d 923 (2d Cir. 1982), *cert. denied*, 461 U.S. 906, 103 S.Ct. 1877 (1983) ("*Gartenberg I*"); *Tarlov* v. *Paine Webber Cash Fund, Inc.*, 559 F. Supp. 429, 437 (D. Conn. 1983).

serve Fund, Inc., 622 F.Supp. 169 (S.D.N.Y. 1985), the plaintiff-shareholder alleged that the management fee paid to the fund's adviser was excessive (36(b) claim) and that the defendants violated § 20(a) because the proxies soliciting shareholder approval of the management contract were misleading. The plaintiff sought repayment of the excessive fees under the § 36(b) claim, and sought profits and/or reimbursements for the amounts paid under the agreements obtained through the misleading proxy. *Schuyt*, 622 F.Supp. at 171. The defendants sought dismissal of the § 20(a) claim on the grounds that § 36(b) provided the exclusive remedy for plaintiff's excessive fee claims.

The court rejected Rowe Price's argument that Schuyt's § 20(a) claim was "'an excessive fee claim dressed in slightly different clothes'" *Id.* at 173-74. It noted:

> Count III of the Third Amended Complaint does not allege *solely* that advisory fees paid by the Fund to Price Associates were excessive. The § 20(a) claim raised in Count III advances distinct factual allegations of material nondisclosures in particular proxy statements, and seeks legal and equitable relief beyond the mere recapture of excessive fees. Because it cannot fairly be characterized as a claim that alleges *solely* a breach of fiduciary duty arising from excessive compensation paid to an investment adviser, plaintiff's § 20(a) claim does not fall within the narrow category of claims that the Second Circuit panel in *Fogel* v. *Chestnutt, supra*, thought might properly be brought only under § 36(b).

Id. at 174 (emphasis in original). In the present case, Kamen has not denominated her claims in separate

counts.[10] However, it is clear from the pleadings that she seeks damages for the alleged § 20(a) violation and reimbursement of excessive fees for the § 36(b) claim. The factual allegations of misleading proxy statements are distinct from the fiduciary breach allegations. Both address a distinct form of cupable conduct separately redressable under the ICA. Following *Schuyt*, the court finds that Kamen should be able to pursue both claims in this lawsuit.

The Supreme Court recently decided a similar issue in *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 103 S.Ct. 683 (1983). In that case, the plaintiff alleged that defendants issued a misleading registration statement, and filed suit under § 10(b) of the Securities Exchange Act of 1934 and § 11 of the Securities Act of 1933. The defendants sought dismissal of the implied action under § 10(b) on the grounds that § 11 provided the exclusive remedy for misrepresentations relating to registration statements. The Supreme Court noted that these two provisions involve distinct causes of action, and were intended to address different wrongdoings. Thus, although the evidence supporting the two claims might overlap, this fact, in and of itself, was insufficient to preclude plaintiff from pursuing both claims. 495 U.S. at 381, 103 S.Ct. at 686.

This analysis applies with equal force to KFS' argument that § 36(b) provides the sole remedy for excessive fees. Section 20(a) was enacted in order to ensure complete and adequate disclosures in proxy materials solicited from mutual fund shareholders. Patterned after § 14 of

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[10] In this respect, Kamen's complaint fails to satisfy the requirements of Fed.R.Civ.P. 10(b), which requires "that each claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count."

the Securities Exchange Act of 1934, it prohibits dissemination of misleading proxies. In order to recover for a violation of this section, the plaintiff must establish "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of the information available." *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 2133 (1976). In contrast, a plaintiff in a § 36(b) suit must prove a breach of fiduciary duty on the part of the investment adviser. 15 U.S.C. § 80a-35(b)(1). Proof of misrepresentations may assist the plaintiff in his burden of proof, but a plaintiff need not establish the existence of misrepresentations in order to prevail on a § 36(b) claim. To prove a § 36(b) violation, the plaintiff must demonstrate that the adviser charges a fee "that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arms length bargaining." *Gartenberg I*, 694 F.2d at 928. Thus, although a violation of §20(a) may be relevant to a § 36(b) claim, it clearly exists independent of that claim. *See Schuyt*, 622 F.Supp. at 176-77.[11] Following *Huddleston*, there is no reason to carve out an exception to the well-recognized implied cause of action from misleading proxy statements under § 20(a) of the ICA.

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[11] The court disagrees with KFS' argument that allowing § 20(a) claims in the context of excessive fee suits would thwart the intent of Congress when it passed § 36(b). According to KFS, allowance of a § 20(a) claim would undermine the procedural restrictions contained in § 36(b). What KFS fails to acknowledge is that a § 20(a) claim exists independent of a § 36(b) claim, and involves different elements of proof. Not all § 36(b) claims involve misleading proxies and a plaintiff needs a misrepresentation in a proxy statement if she wishes to proceed under § 20(a).

Contrary to KFS' argument, the legislative history of the passage of § 36(b) does not evidence a Congressional intent to preclude other suits to recover excessive fees based on wrongdoings prohibited by other sections of the ICA. In *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378-79, 102 S.Ct. 1825, 1839 (1982), the Court held that when Congress amends a pre-existing law, the proper inquiry is not whether Congress intended to create a private remedy to supplement the express remedy, but rather, whether "Congress intended to *preserve* the pre-existing remedy." (emphasis supplied). Prior to the passage of § 36(b), the courts had recognized an implied right of action for claims related to the procurement of an advisory contract which permits excessive fees. *Brown* v. *Bullock*, 294 F.2d 415 (2d Cir. 1961). *Cf. J.I. Case* v. *Borak*, 377 U.S. 426, 84 S.Ct. 1555 (1964) (recognizing an implied cause of action under § 14 of the Securities Exchange Act of 1934). This court agrees with the *Schuyt* court's conclusion that "nothing in the statute or legislative history indicates that Congress intended to preclude a mutual fund shareholder from joining a § 36(b) claim for excessive fees with claims for breach of other fiduciary duties or for other distinct violations of the ICA." *Schuyt*, 622 F.Supp. at 177 (footnote omitted). *See Krome* v. *Merrill Lynch & Co., Inc.*, 637 F.Supp. 910, 917-20 (S.D. N.Y. 1986); Note, *Implied Private Rights of Action under the Investment Company Act of 1940*, 40 Wash. & Lee L.Rev. 1069, 1085-86 (1983).

KFS relies primarily on *Gartenberg I* to support its argument that § 36(b) provides the exclusive remedy for excessive fee claims. *Gartenberg I* provides little support for the argument that § 20(a) claims cannot be joined with claims under § 36(b). In *Gartenberg I*, the plaintiff

did not raise the issue of alleged violations of § 20(a) until after the court had completed a bench trial on his § 36(b) claims. This district court dismissed this belated claim because the alleged misstatements were not misleading. 528 F.Supp. at 1066. It added, "[i]n any event, . . . § 20(a) of the Act w[as] not intended to and do[es] not establish a private right of action in the context of a claim such as here for recovery of compensation under § 36(b)." *Id.* at 1067. On Appeal, the Second Circuit affirmed the District Court's findings with respect to Gartenberg's § 36(b) claims. 694 F.2d at 930-33. The court also affirmed the district court's dismissal of the belated § 20(a) claims because they were not properly before the district court for adjudication. It added, "[i]n any event, for the reasons already expressed by us and the additional reasons stated by the district court in its discussion of these additional claims, . . . they are meritless." 694 F.2d at 934.

The *Gartenberg* plaintiffs filed a second case after the Second Circuit issued its decision in *Gartenberg I*. *Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 573 F.Supp. 1293 (S.D. N.Y. 1983), *aff'd*, 740 F.2d 190 (2d Cir. 1984) (*"Gartenberg II"*). In *Gartenberg II*, the plaintiffs raised claims under both § 20(a) and § 36(b). The case was assigned to the same district judge who tried *Gartenberg I*. It is noteworthy that this judge tried both claims, without mention of his statement in *Gartenberg I* that § 36(b) might preclude § 20(a) claims based on misleading proxies used to authorize excessive fees. *Gartenberg II*, 573 F. Supp. at 1307 (discussing merits of § 20(a) claim). The *Gartenberg II* affirmance also fails to refer to the court's earlier statement that § 36(b) precludes § 20(a) claims in this type of case.

In *Schuyt*, the court noted the same distinction between the treatment of § 20(a) claims in *Gartenberg I* and *Gartenberg II*. It concluded:

> [The District Court's] strikingly different treatment of the two § 20(a) claims raised in *Gartenberg II* strongly suggests that his rejection at [the] § 20(a) claim in *Gartenberg I* and *II* resulted from the defects peculiar to that claim and not from a defect generic to all § 20(a) claims joined with a claim for excessive fees.

Schuyt, 622 F.Supp. at 176.[12] This court agrees that the court's comments in *Gartenberg I* must be viewed in the context of that case. Given the Second Circuit's acknowledgment of § 20(a) claims after *Gartenberg I*, the court finds that this case provides scant support to KFS' argument that § 20(a) claims can never be raised in connection with a § 36(b) suit for excessive fees.

For the reasons set forth above, the court finds that the passage of § 36(b) does not preclude a claim under § 20(a) which alleges that the management contract was secured through a misleading proxy. Therefore, the court denies KFS' motion to dismiss Kamen's § 20(a) claim for failure to state a cause of action.

Rule 23.1's Demand Requirement

This complaint was filed as a shareholder's derivative action in which Kamen seeks to sue on behalf of the Fund

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[12] The court notes that the Second Circuit has issued another decision subsequent to *Gartenberg II* which allowed § 20(a) claims without mention of the possible limitation imposed by § 36(b). *See Meyer* v. *Oppenheimer Management Corp.*, 764 F.2d 76 (2d Cir. 1985).

to recover excessive fees allegedly paid to KFS. Rule 23.1, which governs derivative actions, provides:

> In a derivative action brought by [a] shareholder . . . to enforce a right of a corporation, . . . the corporation having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors, . . . and the reasons for his failure to obtain the action or for not making the effort.

In *Daily Income Fund, Inc.* v. *Fox,* 104 S.Ct. 831, 841 (1984), the Supreme Court held that Rule 23.1's demand requirement is inapplicable to shareholder suits challenging excessive advisory fees under § 36(b). KFS acknowledges that Kamen's § 36(b) claims cannot be dismissed for noncompliance with Rule 23.1; however, it urges the court to dismiss the § 20(a) claims, which are not implicated by the *Fox* decision, because Kamen failed to make a demand on the Fund's Board of Directors in accordance with Rule 23.1.

The purpose of Rule 23.1's demand requirement is to notify directors of a potential claim, so that they may investigate it and pursue intracorporate remedies before a court intervenes at a shareholder's request. *Thornton* v. *Evans,* 692 F.2d 1064, 1080 (7th Cir. 1982); *Mills* v. *Esmark, Inc.,* 91 F.R.D. 70, 72 (N.D. Ill. 1981). The demand requirement stems from the recognition that "derivative actions brought by minority stockholders could, if unconstrained, undermine the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders." *Daily Income Fund, Inc.* v. *Fox,* 104 S.Ct. 831, 836 (1984). Rule 23.1's limitations are "designed to limit the use of the [shareholders' derivative suit] to situations in which, due to an unjustified failure of the corporation to act for itself, it [is] appropriate to permit a shareholder 'to institute and conduct litigation which usually belongs to the corporation.'" *Id.,* citing *Hawes* v. *City of Oakland,* 104 U.S. 450, 460, 26 L.Ed 827 (1882).

The rationale underlying Rule 23.1's demand requirement is two-fold: first, the courts presume that management is in a superior position to assess the merits of a particular claim; and second, assuming the claim is valid, the corporation may possess superior financial resources with which to pursue the litigation. *Lewis* v. *Anselmi,* 564 F. Supp. 768, 771 (S.D. N.Y. 1983); *Abrams* v. *Mayflower Investors, Inc.,* 62 F.R.D. 361, 369 (N.D. Ill. 1974). The "futility" exception to the demand requirement recognizes that there are circumstances where a demand would be a useless gesture, given the relationship between the board of directors and the alleged illegal transaction. Accordingly, Rule 23.1 permits a court to excuse the failure to make a demand if the plaintiff alleges with particularity specific circumstances which indicate that the directors would have ignored her complaints or refused to take any action on them. *See generally Nussbacher* v. *Continental Illinois National Bank & Trust Co. of Chicago,* 518 F.2d 873, 875 (7th Cir.), *cert. denied,* 424 U.S. 928, 96 S.Ct. 1142 (1976) (plaintiff's failure to make formal demand excused because plaintiff was told directly that the directors would not assist her in any way); *In re Kauffman Mutual Funds, Inc.,* 479 F.2d 257, 264-65 (1st Cir.), *cert. denied,* 414 U.S. 857, 94 S.Ct. 161 (1973) (allegations of self-interest or bias may excuse demand); *Untermeyer* v. *Fidelity Daily*

Income Trust, 79 F.R.D. 36, 42 (D. Mass.), *vacated*, 580 F.2d 22 (1st Cir. 1978) (plaintiff should allege facts which show an "unmistakeable antagonism between the trustees and the corporate interests").

It is undisputed that Kamen failed to make a demand on the Fund's Board of Directors. Although the original complaint did not provide any excuse for this non-compliance with Rule 23.1, Kamen has corrected this error by filing an amended complaint which alleges that resort to the Fund's Board of Directors was not attempted because it would have been futile. Paragraph 17 of the Amended Complaint alleges the following facts in support of Kamen's futility claim:

(a) With respect to the claims asserted under § 36 (b) of the Act, no such demand is required;

(b) The board of directors of the Fund consists of ten members. Of those, three are "interested" as defined by the Act; that is, they have a personal financial interest in KFS. In addition, the president of the Fund, John Hawkinson, was formerly president of KFS and is a stockholder of Kemper Corporation, KFS's parent. Furthermore, the so-called "non-interested" directors currently receive aggregate remuneration of approximately $300,000 a year for serving as directors of the Fund and of all of the other funds in the Kemper group. They are dependent upon and subservient to KFS and Kemper Corporation, its parent;

(c) The proxy statement referred to in paragraph 13 above stated: "The accompanying proxy is solicited by the Board of Directors of the Fund . . .", and indeed, the directors did vote, without dissent, to distribute

the proxy statement to Fund shareholders. Any suit, such as the instant suit, brought to establish liability for the material false statements contained in that proxy statement would, if successful, tend to establish culpability and liability on the part of all of the directors of the Fund;

(d) Requiring the plaintiff to make a demand on the Fund or its directors to institute or prosecute this action would be futile. It would be tantamount to asking the directors to sue themselves. Moreover, were the directors to accept such an invitation and institute an action, the prosecution of the action would be in hostile hands inimical to its success;

(e) All of the directors, and the Fund itself, as well as its personnel and policies, are under the control of KFS and Kemper Corporation, its parent;

(f) In responding to the original complaint, the Fund, both in its answer and motion to dismiss, has sought the dismissal of the complaint on substantive grounds;

(g) Under all of the circumstances present in this case, application of a demand requirement would be inconsistent with the federal policy underlying § 20 of the Investment Company Act.

The court finds that, although subsection (a) correctly explains the applicability of Rule 23.1 to the § 36(b) claim, subsections (b) through (g) are insufficient to satisfy the pleading requirements of Rule 23.1.

Rule 23.1 requires a plaintiff to allege facts excusing her failure to make a demand "with particularity." This requirement "'represents a deliberate departure from the

relaxed policy of notice pleading promoted elsewhere in the Federal Rules.'" *Grossman* v. *Johnson*, 89 F.R.D. 656, 659 (D. Mass. 1981); *aff'd.* 674 F.2d 115 (1st Cir.), *cert. denied*, 459 U.S. 838, 103 S.Ct. 85 (1982) (*quoting Heit* v. *Baird*, 567 F.2d 1157, 1160 (1st Cir. 1977)). *See also Kaufman* v. *Kansas Gas & Electric Co.*, 634 F.Supp. 1573, 1578 (D. Kan. 1986) (holding plaintiff to strict pleading requirements); *Adkins* v. *Tony Lama Co., Inc.*, 624 F.Supp. 250, 255 (S.D. Ind. 1985) (conclusory allegations of "futility" insufficient); *Kaufman* v. *Safeguard Scientifics, Inc.*, 587 F.Supp. 486, 489 (E.D. Pa. 1984) (Rule 23.1 requires "meticulous specification" of the facts surrounding plaintiff's failure to make a demand). As the following discussion illustrates, Kamen's generalized allegations of futility have been consistently rejected by the courts as inadequate under Rule 23.1.

Subsection (b) describes the composition of the Fund's ten-member board of directors. Kamen admits that only three of these directors are "interested" under the Act.[13]

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[13] The ICA provides that "No registered investment company shall have a board of directors more than 60 per centum of the members of which are persons who are interested persons of such registered company." 15 U.S.C. § 80a-10(a). Section 2(19) of the Act defines an interested person as follows:

> (19) "Interested person" of another person means—
>
> (A) when used with respect to an investment company
>
> (i) any affiliated person of such company,
>
> (ii) any member of the immediate family of any natural person who is an affiliated person of such company,
>
> (iii) any interested person of any investment adviser of or principal underwriter for such company,
>
> (iv) any person or partner or employee of any person who at any time since the beginning of the

(footnote continued on following page)

The remaining seven members of the board are presumably "non-interested" directors.[14] The mere fact that the directors receive substantial remuneration for acting as directors does not, in and of itself, establish that they could not impartially review the merits of Kamen's excessive fee claim. If the fact that a director is paid for his services was sufficient to avoid Rule 23.1, Rule 23.1 would be rendered ineffective.

Furthermore, the fact that these directors assisted KFS in soliciting the allegedly misleading proxy statement does

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> last two fiscal years of such company has acted as legal counsel for such company,
>
> (v) any broker or dealer registered under the Securities Exchange Act of 1934 or any affiliated person of such a broker or dealer. . . .
>
> *Provided*, That no person shall be deemed to be an interested person of an investment company solely by reason of (aa) his being a member of its board of directors or advisory board or an owner of its securities, or (bb) his membership in the imm
>
> (v) any broker or dealer registered under the Securities Exchange Act of 1934 or any affiliated person of such a broker or dealer. . . .
>
> *Provided*, That no person shall be deemed to be an interested person of an investment company solely by reason of (aa) his being a member of its board of directors or advisory board or an owner of its securities, or (bb) his membership in the immediate family of any person specified in clause (aa) of this proviso; . . . .

15 U.S.C. § 80a-2(19).

[14] Plaintiff also alleges that the president of the Fund is a former president of KFS and a stockholder of KFS's parent, Kemper Corporation. The court questions the relevance of this information on the issue of a demand, since plaintiff does not allege that Hawkinson is even a member of the Fund's Board of Directors. The fact that an *officer* of the Fund had a former affiliation with KFS does not have any bearing on the number of "interested" directors because he would only participate in the Board's decision to pursue the action if he were a *director* of the fund.

not obviate Kamen's duty to make a demand. The courts have consistently held that "mere approval of challenged conduct is insufficient to render the demand futile." *Lewis* v. *Anselmi*, 564 F.Supp. 768, 772 (S.D. N.Y. 1983); *Adkins* v. *Tony Lama Co., Inc.*, 624 F.Supp. 250, 255 (S.D. Ind. 1985); *Lewis* v. *Valley*, 476 F.Supp. 62, 64 (S.D. N.Y. 1979). *See generally Lewis* v. *Graves*, 701 F.2d 245, 248-249 (S.D. N.Y. 1983), and cases cited therein. As the First Circuit aptly remarked, "It does not follow . . . that a director who merely made an erroneous business judgment in connection with what was plainly a corporate act will 'refuse to do [his] duty in behalf on the corporation if [he] were asked to do so.' Indeed, to excuse demand in these circumstances—majority of the board approval of an allegedly injurious corporate act—would lead to serious dilution of Rule 23.1." *In re Kauffman Mutual Funds, Inc.*, 479 F.2d at 265 (citation omitted).[15]

Subsections (d) and (e) state no facts; they merely reiterate Kamen's conclusion of futility based on her conclusory claim that the entire Board is under the control of KFS and Kemper Corporation, its parent. Rule 23.1 requires Kamen to *particularize* her allegations of control. Kamen's complaint implicitly admits that the Board is composed of at least six disinterested directors. She has not presented the court with any information indicating that these directors are incapable of exercising indepen-

[15] The demand would not be excused even if Kamen had named the individual directors in her complaint. The courts have uniformly held that, absent allegations of bias or self-interest, naming the individual directors cannot obviate the demand requirement of Rule 23.1. *See generally Lewis* v. *Graves*, 701 F.2d 245, 249 (2d Cir. 1983); *Lewis* v. *Curtis*, 671 F.2d 779, 785 (3d Cir.), *cert. denied*, 459 U.S. 880, 103 S.Ct. 176 (1982); *Lewis* v. *Sporck*, 612 F. Supp. 1316, 1322 (N.D. Cal. 1985); *Kaufman* v. *Safeguard Scientifics, Inc.*, 587 F. Supp. 486, 489 (E.D. Pa. 1984).

dent judgment or that the three "interested" directors somehow control the outcome of all the Board's decisions. *See Kauffman*, 479 F.2d at 266. A plaintiff's mere speculation that the majority of the board would refuse to take corporate action is insufficient to satisfy Rule 23.1. *Nussbacher*, 518 F.2d at 879 (7th Cir. 1976); *Adkins* v. *Tony Lama Co., Inc.*, 624 F.Supp. 250, 256 (S.D. Ind. 1985).

In subsection (e) Kamen alleges that demand should be excused because the Fund has moved to dismiss the complaint on substantive grounds.[16] The futility of a demand should be gauged at the time the suit is commenced. *Grossman* v. *Johnson*, 674 F.2d 115, 123 (1st Cir.), *cert. denied*, 459 U.S. 838, 103 S.Ct. 85 (1982); *Cramer* v. *GTE Corp.*, 582 F.2d 259, 276 (3d Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1048 (1979); *Shlensky* v. *Dorsey*, 574 F.2d 131, 142 (3d Cir. 1978); *Seidel* v. *Public Service Co. of New Hampshire*, 616 F.Supp. 1342, 1350 (D. N.H. 1985). "It is clear that 'the filing of the complaint cannot be regarded as a demand to sue, for by starting the action [plaintiff has] . . . usurped the field.'" 7C Wright, Miller & Kane, *Federal Practice & Procedure* § 1831, quoting *Lucking* v. *Delano*, 117 F.2d 159, 160 (6th Cir. 1941). The fact that a corporation resists the suit or demands that the requirements of Rule 23.1 be met is insufficient to establish that the board would reject a demand if the plaintiff-shareholder had requested it to act. *See Gartenberg* v. *Merrill Lynch Asset Management, Inc.*, 91 F.R.D. 524, 527 (S.D. N.Y. 1981); *Grossman* v. *Johnson*, 89 F.R.D. 656, 659 (D. Mass. 1981). Kamen thrust the Fund into an adversary role when she instituted this action. She cannot use the fact that the Fund defended itself in this lawsuit to

[16] The Fund has joined Kemper in its motion to dismiss Kamen's § 20(a) claim for failure to make a demand and for failure to state a cause of action.

justify her own failure to comply with Rule 23.1 in the first place.

The demand requirement is a necessary prerequisite to all suits under Rule 23.1.[17] As the court in *Lewis* v. *Anselmi* noted,

> Rule 23.1 represents a strong statement of public policy which this court is bound to enforce. It has its historical origin in a perceived evil, the maintenance of strike suits by minority shareholders which impede corporate management at great cost and to little purpose except the enrichment of counsel, coupled also with unnecessary interference by outsiders with internal corporate affairs, which should have been administered at least in the first instance by those elected by the shareholders to do so.

564 F.Supp. 768, 772 (S.D. N.Y. 1983). The court finds that Kamen's generalized allegations of futility, unsupported by any specific facts, are insufficient to excuse her failure to approach the Fund's Board of Directors before she filed this lawsuit. Accordingly, the court dismisses Kamen's § 20(a) claim for failure to comply with Rule 23.1.

Motion To Strike Jury Demand

The dismissal of Kamen's § 20(a) claim does not affect her § 36(b) claim, which KFS apparently concedes is sufficient for the purposes of Fed.R.Civ.P. 12(b)(6).[18] In

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[17] This court echoes the Seventh Circuit's query in *Nussbacher:* "It may be wondered why counsel would not almost routinely take the course of making a formal demand, diligently and in good faith, and in so doing inform the board adequately of the basis of the claim he was asking them to enforce." 518 F.2d at 877.

[18] KFS recently filed a motion for summary judgment on the issue of whether Kamen can fairly and adequately represent the other shareholders in this action.

addition to the dismissal of the Section 20(a) claim, KFS' motion also seeks to strike Kamen's jury demand on the ground that the Seventh Amendment's right to jury "in actions at law" does not extend to § 36(b) claims, which are essentially equitable in nature.

Section 36(b) of the ICA, 15 U.S.C. § 80a-35(b), creates a cause of action on behalf of a security holder of an investment company to recover excessive fees paid to the investment company's advisor. Subsection (3) of the Act limits this cause of action by providing:

> No such action shall be brought or maintianed against any person other than the recipient of such compensation or payments, and no damages or other relief shall be granted against any person other than the recipient of such compensation or payments. No award of damages shall be recoverable for any period prior to one year before the action was instituted. Any award of damages against such recipient shall be limited to the actual damages resulting from breach of fiduciary duty and *shall in no event exceed the amount of compensation or payments received from such investment company, or the security holders thereof, by such recipient.*

15 U.S.C. § 80a-35(b)(3) (emphasis supplied). The Seventh Circuit has never discussed the right to a jury trial in the context of a Section 36(b) action. To the court's knowledge, only two circuits have addressed the issue, both concluding that a plaintiff in these actions is not entitled to a jury trial on his Section 36(b) claims. *See In re Evangelist*, 760 F.2d 27, 29-30 (1st Cir. 1985); *In re Gartenberg*, 636 F.2d 16, 17-18 (2d Cir. 1980); *cert. denied*, 451 U.S. 910, 101 S.Ct. 1979 (1981). *See also Weissman* v. *Alliance Capital Management Corp.*, 84 Civ. 8904 slip op. at 5-6 (S.D. N.Y. Nov. 26, 1985), *pet. for mandamus denied sub*

sum. In re Weissman, No. 85-3078 (2d Cir. February 5, 1986); *Tarlov* v. *Paine Webber Cashfund, Inc.*, 559 F. Supp. 429, 441 (D. Conn. 1983); *Jerozal* v. *Cash Reserve Management, Inc.*, [1982-83 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 99,019 at 94,827 (S.D. N.Y. 1982); *Markowitz* v. *Brady*, 90 F.R.D. 542, 547-48 (S.D. N.Y. 1981).

These courts all reason that, since § 36(b) involves a claim for breach of fiduciary duty and limits damages to restitution of excessive fees, the action is essentially in equity and therefore not covered by the Seventh Amendment. *Evangelist, supra; Gartenberg, supra.* In the present case, Kamen's Section 36(b) claim is identical to those addressed in the cases listed above. She has not presented the court with any authority rejecting the analysis of the First and Second Circuits on this narrow issue.[19] This

[19] Kamen argues that § 36(b)'s reference to "damages," and her request for "damages" renders her claim an action at law. This argument has been rejected by every court that has considered it. With respect to the fact that the statute uses the word "damages," the *Gartenberg* court held:

> [I]t seems likely from the context that Congress was using 'damages' merely as a shorthand for 'recovery of money,' not as a legal term of art. Since . . . not all claims for monetary relief are legal in nature, the use of the term 'damages' is not persuasive in this instance. In particular, given the repeated statement in the legislative history that actions under 36(b) are equitable, to be administered on equitable standards, it would seem impossible to conclude from the use of the word 'damages' that Congress thereby provided for a trial by jury.

Gartenberg v. *Merrill Lynch Asset Management, Inc.*, 487 F. Supp. 999, 1006 (S.D. N.Y.), *mand. denied sub nom. In re Gartenberg*, 636 F.2d 16 (2d Cir. 1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1979 (1981). *See also In re Evangelist*, 760 F.2d 27, 30 (1st Cir. 1985).

Although the *Evangelist* court was unequivocal in its denial of a right to a jury trial, the *Gartenberg* court qualified its decision in the last paragraph: "Our decision is limited, of course, to the

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court agrees with the controlling weight of authority that Section 36(b) creates restitutionary relief for fiduciary breach, which is traditionally addressed by the courts of equity.[20] Accordingly, the court finds that plaintiff has no

(footnote continued from previous page)

facts of this case. We leave for another day a determination as to the right of a jury trial of a plaintiff making a bona fide claim for damages." *In re Gartenberg*, 636 F.2d at 18. Kamen argues that because her complaint seeks damages, she falls within this *Gartenberg* caveat. The Second Circuit has never explained this final comment to its opinion; however, the court finds that Kamen's Section 36(b) claim is no different than that advanced in *Gartenberg*. The fact that her complaint requests "damages" does not automatically render her claim an action at law. As the *Evangelist* court noted,

> [I]n our view, the right to jury trial cannot turn on the simple substitution of a different word. *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 477-78 (1962) ('the constitutional right to a trial by jury cannot be made to depend on the choice of words used in the pleadings.). . . . Otherwise, any equitable action for money, say for restitution, could become a legal action by the use of the word 'damages' in place of the word 'restitution.'

760 F.2d at 31. The semantics of Kamen's complaint cannot reign over the substance of her Section 36(b) claim, which is an action seeking restitution for excessive fees paid to KFS.

[20] Kamen also argues that Section 44 of the ICA, 15 U.S.C. § 80a-44, refutes KFS' argument regarding the availability of jury trials in § 36(b) suits. Section 44 confers jurisdiction on the federal courts over "all suits in equity and actions at law brought to enforce any liability or duty created by" the ICA, and authorizes the SEC to "intervene as a party in any action or suit to enforce any liability or duty created by, or to enjoin any non-compliance with, Section 36(b) . . ." Kamen maintains that these provisions indicate that actions under § 36(b) can be characterized as suits at law, thereby entitling her to a jury trial. As KFS correctly notes, however, this language merely permits the SEC to intervene in § 36(b) actions; it does not change the equitable nature of the action or the remedy that the plaintiff seeks. The gist of an action under § 36(b) is a suit for an accounting, and the remedy is limited by statute to restitution of the excessive fees paid. Under the circumstances, this action is properly characterized as one in equity, in which Kamen is not entitled to a jury trial.

Memorandum Opinion and Order

right to jury trial for his § 36(b) claims, and grants KFS' motion to strike Kamen's jury demand.

Conclusion

In the present case, although Kamen alleged sufficient facts to state a claim under § 20(a), she failed to comply with Rule 23.1's important demand requirement, and her proffered excuse for this non-compliance is insufficient to satisfy the futility exception to the rule. Accordingly, the court dismisses Kamen's § 20(a) claim for failure to make a demand on the Fund's Board of Directors. In addition, the court finds that Kamen is not entitled to a jury trial on her § 36(b) claim, and grants KFS' motion to strike her jury demand.

ENTER:

/s/ JOHN A. NORDBERG
JOHN A. NORDBERG
United States District Judge

Dated: February 2, 1987

Order

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

March 30, 1987

By the Court:

JILL S. KAMEN,

Petitioner,

No. 87-1455 v.

HONORABLE JOHN A. NORDBERG, United States District Judge of the District Court for the Northern District of Illinois, Eastern Division,

Respondent.

Petition for Writ of Mandamus

This matter comes before the court for its consideration of the "PETITION FOR WRIT OF MANDAMUS" filed herein on March 24, 1987 by counsel for the petitioner.

On consideration thereof,

IT IS ORDERED that counsel for Kemper Financial Services, as a respondent to the petition under Rule 21(b), Fed. R. App. P., shall file a response to this petition by April 9, 1987. By that same date, petitioner shall file a supplemental memorandum addressing the applicability to this case of our decision in *First National Bank of Waukesha* v. *Warren*, 796 F.2d 999 (7th Cir. 1986).

Order Denying Petition for Writ of Mandamus

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

April 13, 1987

Before

HON. JOEL M. FLAUM, *Circuit Judge*
HON. FRANK H. EASTERBROOK, *Circuit Judge*
HON. DANIEL A. MANION, *Circuit Judge*

JILL S. KAMEN,

Petitioner,

No. 87-1455 v.

HONORABLE JOHN A. NORDBERG, United States District Judge of the District Court for the Northern District of Illinois, Eastern Division,

Respondent.

Petition for Writ of Mandamus

This matter comes before the court for its consideration upon the following documents:

1. The "PETITION FOR WRIT OF MANDAMUS" filed herein on March 24, 1987.
2. The "PETITIONER'S SUPPLEMENTAL MEMORANDUM" filed herein on April 9, 1987.

Order Denying Petition for Writ of Mandamus

3. The "KEMPER FINANCIAL SERVICES, INC.'S ANSWER TO THE PETITION FOR WRIT OF MANDAMUS" filed herein on April 9, 1987.

On consideration thereof,

IT IS ORDERED that the "PETITION FOR WRIT OF MANDAMUS" is DENIED. *First National Bank of Waukesha* v. *Warren*, 796 F.2d 999 (7th Cir. 1986).

Order

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

April 28, 1987

By the Court:

JILL S. KAMEN,

Petitioner,

No. 87-1455 v.

HONORABLE JOHN A. NORDBERG, United States District Judge of the District Court for the Northern District of Illinois, Eastern Division,

Respondent.

Petition for Writ of Mandamus

Judge Flaum has recused himself from participation in this appeal and withdraws his vote on the court's order of April 13, 1987. That order will stand on the votes of Judge Easterbrook and Judge Manion. The petitioner's request for rehearing *en banc* is still pending.

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

May 19, 1987

Before

HON. FRANK H. EASTERBROOK, *Circuit Judge*
HON. DANIEL A. MANION, *Circuit Judge*

No. 87-1455

In the Matter of:

JILL S. KAMEN,

Petitioner.

Petition for Writ of Mandamus

ORDER

Petitioner filed a petition for rehearing and suggestion of rehearing en banc on April 24, 1987. At the request of a member of the panel, the petition was circulated to the full court. See Operating Procedure 1(a)(2). No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and both of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED. Circuit Judge Flaum did not participate in the consideration of or decision on this petition.

Supplemental Amended Complaint

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

85 C 4587—Judge Nordberg

JILL S. KAMEN,

Plaintiff,

—against—

KEMPER FINANCIAL SERVICES, INC., and
CASH EQUIVALENT FUND, INC.,

Defendants.

PLAINTIFF DEMANDS TRIAL BY JURY

Plaintiff, by her attorneys, alleges as follows, on information and belief, except as to the allegations in paragraph 3, which are alleged on knowledge:

1. This Court has jurisdiction of this action under the Investment Company Act of 1940 as amended, 15 U.S.C. § 80a-1 et seq. (the "Act"), and in particular § 36 and § 44 thereof, 15 U.S.C. § 80a-35 and § 80a-43.

2. The cause of action arises under the Act and in particular under § 20 and § 36 thereof.

3. Plaintiff is a shareholder of defendant Cash Equivalent Fund, Inc. (the "Fund") and has been a shareholder

of the Fund at all times relevant herein. Plaintiff brings this action on behalf of the Fund.

4. The Fund is a diversified open-end investment company registered with the Securities and Exchange Commission under the Act. Its principal place of business is located at 120 South LaSalle Street, Chicago, Illinois 60603. It is the type of investment company commonly referred to as a money market fund.

5 (a). The Fund's investment objective is to seek the maximum current income consistent with stability of capital. The Fund invests in a range of short-term money market instruments which have maturities not exceeding one year. These instruments include obligations of the United States Government and its agencies and instrumentalities, certificates of deposit, bankers acceptances, fixed time deposits, commercial paper, and repurchase agreements. Although the Fund did not commence operations until March 16, 1979, its total assets as of April 23, 1985 were approximately $4,683,000,000 in its money market portfolio and $470,000,000 in its government securities portfolio.

(b). As of November 26, 1986 the Fund's total assets consisted of $5,390,000,000 in its money market portfolio and $660,000,000 in its government securities portfolio.

6. At all times relevant herein, defendant Kemper Financial Services, Inc. ("KFS") has acted as investment adviser, manager, primary administrator and underwriter for the Fund.

7 (a). During all times relevant herein, KFS has received and continues to receive a monthly fee divided into

which are not primarily intended to result in the sale of Fund shares. Indeed, the payments made pursuant to the administration agreement are not based upon sales of Fund shares, but rather upon the assets previously invested in the Fund by customers of KFS affiliates and other broker-dealers to whom the payments are made. Those payments are made without regard to whether sales are being effected by such entities. They are made primarily to enrich KFS, the KFS affiliates and the broker-dealers and are designed neither to promote the sale of Fund shares nor to benefit the Fund or its shareholders.

8. Because of the tremendous growth in the size of the Fund, the fees paid and payable to KFS have increased enormously. Thus, for the fiscal year ended July 31, 1984, the Fund paid KFS nearly $20,000,000 in fees. Of this amount, $7,481,000 was paid under the investment management agreement and $11,936,000 was paid under the administration agreement. KFS has entered into related services agreements with various firms and, during the 1984 fiscal year paid $11,602,000 to such firms. Of that amount, $2,817,000 was paid to broker-dealer firms affiliated with Kemper Corporation, of which KFS is a wholly owned subsidiary. At the present time, the Fund's obligations to KFS under the agreements have increased with the size of the Fund and are running at a rate in excess of $33,000,000 per year. Under the amended administration agreement, firms affiliated with KFS will receive approximately $5,750,000 per year at the present size of the Fund.

9. Unlike most other investment companies, the management of the assets of the money market fund, such as the Fund herein, does not require the detailed analysis of in-

two parts and paid under two separate agreements. Under an investment management agreement, the Fund pays KFS an investment management fee at the annual rate of .22 of 1% of the first $500,000,000 of the combined average daily net assets of the portfolios KFS manages, .20 of of 1% of the next $500,000,000, .175 of 1% of the next $1 billion, .16% of the next $1 billion and .15 of 1% of average daily net assets of such portfolios over $3 billion. Under an administration, shareholder services and distribution agreement ("administration agreement") the Fund pays KFS an annual fee, payable monthly, on a basis of .33% of the first $500,000,000 of average daily net assets, .30% of the next $500,000,00, .275% of the next $1 billion, .265% of the next $1 billion, and .25% of average daily net assets over $3 billion.

(b) Effective November 4, 1986, KFS caused the administration agreement with the Fund to be amended to substantially increase the fees payable by the Fund to KFS. Under the amended agreement, the Fund pays to KFS administration fees at the annual rate of .38%. This increase required a change in the expense limitation which otherwise would have been exceeded by the enormous fee burden imposed upon the Fund.

(c). The administration agreement and its amendment were purportedly adopted pursuant to Rule 12b-1 promulgated by the Securities and Exchange Commission under the Act. Under that Rule payments may be made by an investment company, such as the Fund, only if they are pursuant to a plan primarily intended to result in the sale of shares of such investment company. However, the administration agreement entered into between the Fund and KFS and the amendment thereto encompass payments

dustries nor of complex industrial companies and the concomitant retention of a large staff of highly paid and sophisticated securities analyst. Indeed, the assets of the fund, are and have been, invested in a relatively concentrated manner in fixed income obligations maturing in one year or less. In the ordinary course of operations, decisions to purchase are made on the same day that the funds are received.

10. Despite the huge growth in the size of the Fund, the only changes in the fee structure were made on Decembr 1, 1981 and November 4, 1986 when, in spite of the economies of scale resulting from the Fund's enormous growth, the fees were increased by virtue of the adoption and amendment of the administration agreement.

11. As a result of the tremendous increase in the assets of the Fund, the compensation paid and payable to KFS has increased enormously and disproportionately to the services rendered by it.

12. In addition to acting as investment manager to the Fund, KFS also acts as an investment manager to numerous other accounts and investment companies. Among those investment companies is Kemper Money Market Fund, Inc. ("MM"). MM, like the Fund, is a money market fund with the identical objective of obtaining maximum current income to the extent consistent with stability of principal. It is approximately the same size as the Fund, has approximately the same number of shareholders, and invests in the same types of securities as does the fund. The directors and many of the officers and other personnel servicing MM are the same as those performing services

for the Fund. KFS is the investment adviser, manager, and underwriter for MM and supplies to MM substantially the same services that it supplies or causes to be supplied to the Fund. Yet, KFS exacts substantially greater fees from the Fund than it does from MM and many of its other clients. Thus, in the year ended July 31, 1984, the Fund's expenses were .72% of its average net assets, whereas those of MM were only .53%, and in every year since 1981 the expenses of the Fund have been significantly greater than those of MM. As a result, the Fund's yield for the year ended September 30, 1984 was approximately 21 basis points less than that of MM, so that the Fund's investment objective of obtaining maximum current income consistent with stability was effectively thwarted by KFS's exaction of exorbitant fees.

13. On or about September 12, 1984, KFS caused to be distributed to the shareholders of the Fund a proxy statement for the annual meeting of shareholders on November 8, 1984. One of the principal purposes of the meeting which KFS was eager to accomplish was to obtain shareholder approval of the continuance of the investment management agreement between the Fund and KFS. The shareholders were asked to approve the agreement and were offered no alternative in the event of disapproval. As part of this solicitation, the proxy statement compared the services and fees offered and received by KFS from other investment companies. The proxy statement correctly described the services rendered to MM as being similar to those rendered to the Fund, but it misleadingly described the fees charged to MM as consisting of "a maximum fee of .50 of 1% of the first $215,000,000 with lesser rates on additional assets." This gave the false

impression that the fees paid by MM were as high or higher than the fees paid by the Fund, whereas KFS knew that the fees received by it from MM were substantially lower than those received by it from the Fund, and that, in fact, for the year ended July 31, 1984 the fees received by KFS from MM aggregated only .28% of MM's average daily net assets. In disseminating the proxy statement to the shareholders of the Fund, KFS used the mails and means and instrumentalities of interstate commerce in violation of § 20 of the Act. The solicitation was successful, and KFS obtained shareholder approval of its management agreement with the Fund, to the damage of the Fund and its shareholders.

14. Because of the limited number, nature and variety of the Fund's investments, the investment decisions of the Fund can be made by a single person, or, at most, a handful of persons. The research and advisory activities of KFS are merely routine and administrative in nature, do not require any significant expertise or investment acumen, are performed (and were performed prior to the formation of the Fund) by KFS for other of its accounts, and consist principally of purchasing and "turning over" money market instruments with a limited number of institutions. The incremental costs to KFS of performing these services for the Fund is minimal. In short, the investment advice provided by KFS is not worth the fees paid for that advice by the Fund and has not been worth the fees paid during the period covered by this complaint. Other advisers performed and have performed similar or superior services for lesser rates.

15. The advisory and management fees paid by the Fund to KFS are exorbitant, unreasonable, excessive and completely disproportionate to the services rendered in return therefore.

16. Pursuant to § 36(b) of the Act, KFS has a fiduciary duty with respect to the receipt of compensation from the Fund. By virtue of the foregoing, KFS has breached its fiduciary duty to the Fund.

17. No demand has been made by the plaintiff upon the Fund or its directors to institute or prosecute this action for the following reasons:

(a) With respect to the claims asserted under § 36(b) of the Act, no such demand is required;

(b) The board of directors of the Fund consists of ten members. Of those, three are "interested" as defined by the Act; that is, they have a personal financial interest in KFS. In addition, the president of the Fund, John Hawkinson, was formerly president of KFS and is a stockholder of Kemper Corporation, KFS's parent. Furthermore, the so-called "non-interested" directors currently receive aggregate remuneration of approximately $300,000 a year for serving as directors of the Fund and of all of the other funds in the Kemper group. They are dependent upon and subservient to KFS and Kemper Corporation, its parent;

(c) The proxy statement referred to in paragraph 13 above stated: "The accompanying proxy is solicited by the Board of Directors of the Fund . . .", and indeed, the directors did vote, without dissent, to distribute the proxy statement to Fund shareholders. Any suit, such as the instant suit, brought to establish liability for the material false statements contained in that proxy statement would,

if successful, tend to establish culpability and liability on the part of all of the directors of the Fund;

(d) Requiring the plaintiff to make a demand on the Fund or its directors to institute or prosecute this action would be futile. It would be tantamount to asking the directors to sue themselves. Moreover, were the directors to accept such an invitation and institute an action, the prosecution of the action would be in hostile hands inimical to its success;

(e) All of the directors, and the Fund itself, as well as its personnel and policies, are under the control of KFS and Kemper Corporation, its parent;

(f) In responding to the orignal complaint, the Fund, both in its answer and motion to dismiss, has sought the dismissal of the complaint on substantive grounds;

(g) Under all of the circumstances present in this case, application of a demand requirement would be inconsistent with the federal policy underlying § 20 of the Investment Company Act.

WHEREFORE, plaintiff prays for judgment:

(1) requiring KFS to pay to the Fund its damages;

(2) awarding plaintiff the costs and expenses of this action, including reasonable attorneys' fees; and

(3) awarding plaintiff such other and further relief as the Court may deem just and proper.

Dated: Chicago, Illinois
December , 1986

JOEL J. SPRAYREGEN
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Attorneys for Plaintiff

Supplemental Amended Complaint

PLAINTIFF'S VERIFICATION

STATE OF NEW YORK,
COUNTY OF NASSAU, *ss.*:

JILL S. KAMEN, being duly sworn, deposes and says that I am the plaintiff named herein, and that I have read the foregoing Amended Complaint and know the contents thereof, and that the same is true to my own knowledge except as to those matters therein stated to be alleged upon information and belief and as to those matters I believe them to be true.

.....

JILL S. KAMEN

Sworn to before me this
day of December, 1986

.....

NOTARY PUBLIC

Statutes Involved

Section 20(a) of the Investment Company Act of 1940, as amended; 15 U.S.C. § 80a-20(a):

> (a) It shall be unlawful for any person, by use of the mails or any means or instrumentality of interstate commerce or otherwise, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security of which a registered investment company is the issuer in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 36(b) of the Investment Company Act of 1940, as amended; 15 U.S.C. § 80a-35(b):

> (b) For the purposes of this subsection, the investment adviser of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company, or by the security holders thereof, to such investment adviser or any affiliated person of such investment adviser. An action may be brought under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company, against such investment adviser, or any affiliated person of such investment adviser, or any other person enumerated in subsection (a) of this section who has a fiduciary duty concerning such compensation or payments, for breach of fiduciary duty in respect of such compensation or payments paid by such registered investment company or by the security holders thereof to such investment ad-

viser or person. With respect to any such action the following provisions shall apply:

(1) It shall not be necessary to allege or prove that any defendant engaged in personal misconduct, and the plaintiff shall have the burden of proving a breach of fiduciary duty.

(2) In any such action approval by the board of directors of such investment company of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, and ratification or approval of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, by the shareholders of such investment company, shall be given such consideration by the court as is deemed appropriate under all the circumstances.

(3) No such action shall be brought or maintained against any person other than the recipient of such compensation or payments, and no damages or other relief shall be granted against any person other than the recipient of such compensation or payments. No award of damages shall be recoverable for any period prior to one year before the action was instituted. Any award of damages against such recipient shall be limited to the actual damages resulting from the breach of fiduciary duty and shall in no event exceed the amount of compensation or payments received from such investment company, or the security holders thereof, by such recipient.

(4) This subsection shall not apply to compensation or payments made in connection with transactions

subject to section 80a—17 of this title, or rules, regulations, or orders thereunder, or to sales loans for the acquisition of any security issued by a registered investment company.

(5) Any action pursuant to this subsection may be brought only in an appropriate district court of the United States.

(6) No finding by a court with respect to a breach of fiduciary duty under this subsection shall be made a basis (A) for a finding of a violation of this subchapter for the purposes of sections 80a—9 and 80a—48 of this title, section 78o of this title, or section 80b—3 of this title, or (B) for an injunction to prohibit any person from serving in any of the capacities enumerated in subsection (a) of this section.

Section 44 of the Investment Company Act of 1940, as amended; 15 U.S.C. § 80a-43:

> The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. A criminal proceeding based upon a violation of section 34, or upon a failure to file a report or other document required to be filed under

this title, may be brought in the district wherein the defendant is an inhabitant or maintains his principal office or place of business. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28, United States Code. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court. The Commission may intervene as a party in any action or suit to enforce any liability or duty created by, or to enjoin any noncompliance with, section 36(b) of this title at any stage of such action or suit prior to final judgment therein.

OPPOSITION

BRIEF

No. 86-2070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JILL S. KAMEN,

Petitioner,

v.

HONORABLE JOHN A. NORDBERG, United States District Judge of the District Court for the Northern District of Illinois, Eastern Division (KEMPER FINANCIAL SERVICES, INC. and CASH EQUIVALENT FUND, INC., real parties in interest),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant a petition for a writ of certiorari to review the Seventh Circuit Court of Appeals' denial of a petition for a writ of mandamus to the district court, where both the appellate court and the district court followed unanimous precedent in denying a jury trial demand in an action under section 36(b) of the Investment Company Act of 1940.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to this case in the United States Court of Appeals for the Seventh Circuit, *In re Kamen*, No. 87-1455, were Jill S. Kamen, an individual, as petitioner for a writ of mandamus, Kemper Financial Services, Inc., and Cash Equivalent Fund, Inc., as respondents. The Honorable John A. Nordberg was the district court judge who issued the order striking plaintiff Kamen's jury demand.

RULE 28.1 LISTING

The Rule 28.1 listing is in Appendix B.

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TABLE OF AUTHORITIES

No. 86-2070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JILL S. KAMEN,

Petitioner,

v.

HONORABLE JOHN A. NORDBERG, United States District Judge of the District Court for the Northern District of Illinois, Eastern Division (KEMPER FINANCIAL SERVICES, INC. and CASH EQUIVALENT FUND, INC., real parties in interest),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Neither the decision of the Court of Appeals nor the District Court is reported.

STATEMENT OF THE CASE

Petitioner Jill S. Kamen, plaintiff below ("plaintiff"), is a shareholder in Cash Equivalent Fund (the "Fund"), an investment company registered under the Investment Company Act of 1940 ("the Act"). The Fund is of the type commonly referred to as a money market fund. Kemper Financial Services, Inc. ("KFS") is the investment adviser and underwriter of the Fund.

On May 10, 1985, the plaintiff filed a one-count shareholder's derivative action, asserting claims against KFS and the Fund under sections 20(a) and 36(b) of the Act, 15 U.S.C. §§ 80a-20(a), 80a-35(b). The complaint alleged that KFS had violated the proxy provisions of section 20(a) and breached its fiduciary duty under section 36(b) by charging excessive investment advisory fees. (Supplemental Amended Complaint ¶¶ 11, 12, 13, 15, 16).[1] The plaintiff demanded a trial by jury.

KFS moved to dismiss plaintiff's section 20(a) proxy violation claim and to strike the jury demand on the section 36(b) claim. On February 2, 1987, the district court issued a memorandum opinion and order. (Pet. App. 1a-26a).[2] The district court dismissed the section 20(a) claim and struck the jury demand.[3] The district court held

[1] Although the plaintiff filed an Amended Complaint on July 23, 1985 and a Supplemental Amendment on December 8, 1986 containing additional allegations, the nature of the claim remains the same as in the original complaint.

[2] "Pet. App." refers to the appendix to the petition filed with this Court. "Pet." refers to the petition for a writ of certiorari.

[3] In her petition to this Court, plaintiff concedes that the dismissal of the section 20(a) claim is not subject to review now and need not be considered by this Court. *See* Pet. 9, n*.

that the plaintiff's jury demand should be stricken because section 36(b) creates an equitable cause of action which does not entitle plaintiff to a jury trial, and because plaintiff's claim is for restitution of allegedly excessive fees, a claim that is equitable in nature.

After reviewing prior judicial decisions and the legislative history of section 36(b), the district court followed the unanimous decisional law on this issue and held that "since § 36(b) involves a claim for breach of fiduciary duty and limits damages to restitution of excessive fees, the action is essentially in equity and therefore not covered by the Seventh Amendment." (Pet. App. 24a). The district court rejected the plaintiff's argument that simply because she requested "damages," her claim was an action at law that entitled her to a jury trial, stating "[t]he semantics of Kamen's complaint cannot reign over the substance of her Section 36(b) claim, which is an action seeking restitution for excessive fees paid to KFS." (Pet. App. 25a, n.19). Plaintiff filed a motion for reconsideration, which was denied.

On March 24, 1987, in an effort to obtain interlocutory review of the dismissal of the section 20(a) claim and the order striking the jury demand, plaintiff filed a petition for a writ of mandamus in the United States Court of Appeals for the Seventh Circuit. On April 13, 1987, the Seventh Circuit denied the petition, citing *First National Bank of Waukesha v. Warren*, 796 F.2d 999 (7th Cir. 1986). (Pet. App. 28a-29a). The plaintiff filed a petition for rehearing and suggestion of rehearing *en banc*, which was denied on May 19, 1987. (Pet. App. 31a). On June 24, 1987, plaintiff filed her petition for a writ of certiorari which only addresses the question whether the Court of Appeals should have issued a writ of mandamus requiring the district court to vacate its order striking her jury demand for the section 36(b) claim.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT'S DENIAL OF MANDAMUS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT.

The plaintiff asserts that a conflict exists among the circuits and between the Seventh Circuit and this Court on the need for plenary consideration of a mandamus petition when jury trial rights are implicated. (Pet. 4-7). However, the real issue before this Court is not the procedure used by the Seventh Circuit to reach its decision, but whether the Appellate Court properly denied the petition for a writ of mandamus. The plaintiff's statement of the substantive law is in error; the denial of mandamus in this case was consistent with all existing case law. No conflict exists on this issue.

The Seventh Circuit's denial of the petition for a writ of mandamus is in accord with the three appellate court decisions directly on point. *In re Gartenberg*, 636 F.2d 16 (2d Cir. 1980), *cert. denied*, 451 U.S. 910 (1981); *In re Evangelist*, 760 F.2d 27 (1st Cir. 1985); *In re Weissman*, No. 85-3078 (2d Cir. Feb. 5, 1986) (a copy of this unpublished order is attached as Appendix A). All three cases addressed whether mandamus relief may be granted when a jury trial demand is stricken in a section 36(b) case. All three decisions held that the petition for a writ of mandamus should be denied. In *Gartenberg* and *Evangelist*, the First and Second Circuits issued opinions which concur with the district court's decision in this case that a jury trial is not available in a section 36(b) case. In *Weissman*, the Second Circuit, like the Seventh Circuit in this case, merely denied the mandamus petition without

an opinion. Thus, the Seventh Circuit's denial of the mandamus petition is consistent with all prior cases on point.

Contrary to plaintiff's principal argument (Pet. 4-7), the Seventh Circuit's denial of the mandamus petition also is consistent with the law governing mandamus relief. A writ of mandamus may be issued to a trial court only when it has engaged in a patent abuse of law. *See Kerr v. United States District Court*, 426 U.S. 394, 402-03 (1976); *In re Don Hamilton Oil Co.*, 783 F.2d 151, 151-52 (8th Cir. 1986). As this Court has recognized, mandamus is appropriate only for "exceptional circumstances amounting to judicial 'usurpation of power.'" *Kerr*, 426 U.S. at 402, quoting from *Will v. United States*, 389 U.S. 90, 95 (1967). Here, the district court did not ignore precedent, but instead followed unanimous precedent in ruling that a section 36(b) plaintiff has no right to a jury trial. (*See* discussion below at 8-11). The plaintiff here is not seeking mandamus to correct any clear abuse of established law, but rather to refute established law. Moreover, plaintiff is attempting to avoid the normal channels of review and the policy against interlocutory, piecemeal review.[4] A mandamus petition is not the proper vehicle for establishing new rules of law. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953).

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[4] This Court observed in *Kerr* that "[a] judicial readiness to issue a writ of mandamus in anything less than an extraordinary situation" would defeat the policy against piecemeal appeals and thwart Congress' intention, as a general rule, to delay appellate review until after final judgment. *Kerr*, 426 U.S. at 403. This observation is equally applicable in the case at bar. Indeed, by filing a petition for mandamus, rather than seeking an appeal under 28 U.S.C. § 1292(b), or waiting until a final judgment, plaintiff sought to circumvent the procedural requirements for an interlocutory appeal and avoid the finality doctrine.

The plaintiff also asserts that, as a procedural matter, the Seventh Circuit's failure to give plenary consideration to the petition for mandamus violated the rule established in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). Plaintiff argues that under these cases, plenary review must be granted to all mandamus petitions which assert an improper denial of a jury trial demand, no matter how frivolous that assertion. (Pet. 7). She claims that these cases conflict with the Seventh Circuit's decision in *First National Bank of Waukesha v. Warren*, 796 F.2d 999 (7th Cir. 1986), which was cited in the Seventh Circuit's denial of the writ of mandamus in this case.

The decision in this case is not inconsistent with either *Beacon Theatres* or *Dairy Queen*; but even if it were, this case would not be an appropriate vehicle for examining when plenary consideration of a mandamus petition is required because plaintiff's claimed right to jury trial here has no foundation. In *Beacon Theatres*, this Court recognized "the right to grant mandamus to require jury trial where it has been improperly denied." 359 U.S. at 511. In *Dairy Queen*, the Court noted "the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury." 369 U.S. at 472. Neither case establishes an automatic or "clear and indisputable" right to a writ of mandamus whenever a district court strikes a jury demand. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953), quoting from *United States v. Duell*, 172 U.S. 576, 582 (1899).[5] Rather, these cases establish a right to mandamus only when a jury trial has been improperly denied.[6] Here, the district court properly struck the jury demand, and the Court of Appeals therefore properly denied the petition for a writ of mandamus.

[5] Nor does the fact that this case involves questions concerning the right to a jury trial require that this Court grant the petition

(Footnote continued on following page)

This Court should not accept a case for review in order to evaluate the means by which the lower court arrived at a correct judgment. This Court sits "to decide concrete cases and not abstract propositions of law." *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981). The denial of the petition for mandamus, the judgment for which review is sought, is not in conflict with any decision of this Court or any other court.

[5] *continued*
for certiorari. This Court often has refused to review interlocutory decisions denying the right to a jury trial. *E.g., Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978); *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275 (D. Conn. 1976), *aff'd sub nom. East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977), *cert. denied*, 434 U.S. 969 (1977); *Commonwealth v. Wheeling-Pittsburgh Steel Corp.*, 473 Pa. 432, 375 A.2d 320, *cert. denied*, 434 U.S. 969 (1977). Most notably, this Court previously has declined to review the exact jury trial issue presented in this case, *i.e.*, whether a Court of Appeals erred in refusing to issue a writ of mandamus to a district court that had held the plaintiff was not entitled to a jury trial in an action under section 36(b) of the Act. *Gartenberg v. Pollack*, 451 U.S. 910 (1981) (denying petition for certiorari).

[6] The Seventh Circuit's decision in *Waukesha* carefully analyzed the *Beacon Theatres* and *Dairy Queen* cases and distinguished them from cases in which the right to jury trial is uncertain and the issue can be addressed on appeal from a final judgment. The *Waukesha* decision does nothing more than apply the rules for granting mandamus in all other cases in the same way to jury trial issues. That result is not inconsistent with either *Beacon Theatres* or *Dairy Queen*.

II.

THE SEVENTH CIRCUIT PROPERLY DENIED THE PETITION FOR A WRIT OF MANDAMUS BECAUSE PLAINTIFF HAS NO RIGHT TO A JURY TRIAL UNDER SECTION 36(b) OF THE INVESTMENT COMPANY ACT.

Evaluation of plaintiff's assertion that the Seventh Circuit improperly denied her petition for a writ of mandamus turns on the strength of her claim that she is entitled to a jury trial on her section 36(b) claim that the investment adviser charged excessive fees. If the plaintiff has no right to jury trial, the Seventh Circuit properly ruled and no basis exists for modification of its order. The cases which have addressed this issue are in total accord. With rare unanimity, the courts have ruled that no jury trial right exists under section 36(b), because it creates only equitable rights. *See Gartenberg v. Merrill Lynch Asset Management, Inc.*, 487 F. Supp. 999, 1006 (S.D.N.Y), *mandamus denied sub nom. In re Gartenberg*, 636 F.2d 16, 18 (2d Cir. 1980), *cert. denied*, 451 U.S. 910 (1981); *In re Evangelist*, 760 F.2d 27, 29-31 (1st Cir. 1985) (affirming the unpublished trial court opinion); *Tarlov v. Paine Webber Cashfund, Inc.*, 559 F. Supp. 429, 441 (D. Conn. 1983); *Jerozal v. Cash Reserve Management, Inc.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,019, pp. 94,821, 94,827 (S.D.N.Y. Aug. 10, 1982); *Markowitz v. Brody*, 90 F.R.D. 542, 547-48 (S.D.N.Y. 1981); *Weissman v. Alliance Capital Management Corporation*, 3 Fed. R. Serv. 3d (Callaghan) 1380, 1382-84 (S.D.N.Y. 1985), *mandamus denied sub nom. In re Weissman*, No. 85-3078 (2d Cir. Feb. 5, 1986).

Nine courts, including the court below, have examined the statute and the legislative history of section 36(b) and have concluded that actions under this section are equitable in nature. Indeed, section 36(b) is entitled "Breach

of Fiduciary Duty" and actions for breach of fiduciary duty are equitable in nature. *In re Evangelist*, 760 F.2d at 29; Restatement of Restitution, Introductory Note at 9 (1937) ("equity still retains jurisdiction over nearly all situations involving a breach of a fiduciary duty"). The remedy provided by the statute, disgorgement of excessive compensation, is the same as an accounting and restitution, which are equitable remedies. Moreover, section 36(b)(2) provides that evidence that the board of directors or shareholders approved the challenged fees "shall be given such consideration by the court as is deemed appropriate under all the circumstances." 15 U.S.C. § 80a-35(b)(2). By using the word "court," Congress recognized that an action under 36(b) would be presented to a judge, not a jury.

The legislative history also establishes the equitable nature of section 36(b). The purpose of the legislation was "to define the equitable standards governing relationships between investment companies and their investment advisers and principal underwriters." Conf. Rep. No. 91-1631, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4943. The Senate stated that "section 36(b) provides for an equitable action for breach of fiduciary duty as does section 36(a)." S. Rep. No. 91-184, 91st Cong., 1st Sess. 16 (1969), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4897, 4911. The Senate Report notes that "[this bill] is in accordance with the traditional function of the courts to enforce such fiduciary duties in similar type relationships." S. Rep. No. 91-184, 91st Cong., 1st Sess. 6 (1969), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4897, 4902. Finally, the Senate Report states that: "[s]ection 36(b) authorizes the Commission and also a shareholder acting on behalf of the fund to institute an equitable action involving a claim of breach

of fiduciary duty." S. Rep. No. 91-184, 91st Cong., 1st Sess. 16 (1969), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4897, 4910-11. This language demonstrates that Congress recognized that section 36(b) actions were equitable actions to be heard by a judge.

Contrary to plaintiff's assertions (Pet. 7), she is not entitled to a jury trial merely because the word "damages" appears in section 36(b)(3). As the district court stated, "[t]his argument has been rejected by every court that has considered it." (Pet. App. 24a, n.19). As noted above, the legislative history repeatedly states that section 36(b)(3) actions are equitable actions, making it "impossible to conclude from the use of the word 'damages' that Congress thereby provided for a trial by jury." *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 487 F. Supp. at 1006.

Similarly, plaintiff's assertion that the words "action or suit" in section 44 of the Act demonstrate that Congress intended a jury trial is without merit. As the district court recognized (Pet. App. 25a, n.20):

> this language merely permits the SEC to intervene in § 36(b) actions, it does not change the equitable nature of the action or the remedy that the plaintiff seeks. The gist of an action under § 36(b) is a suit for an accounting, and the remedy is limited by statute to restitution of the excessive fees paid. Under the circumstances, this action is properly characterized as one in equity, in which Kamen is not entitled to a jury trial.

The legislative history of section 36(b), the language of the statute, and the well-established case law all support the decision of the district court. The courts unanimously agree and the legislative history demonstrates that section 36(b) creates an equitable claim to be tried to a court,

not a jury. The plaintiff's underlying claim that she is entitled to a jury trial has no merit. Therefore, the petition for mandamus was properly denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent
Kemper Financial Services, Inc.

Dated: July 17, 1987

* Counsel of Record

APPENDIX A

United States Court of Appeals

FOR THE

SECOND CIRCUIT

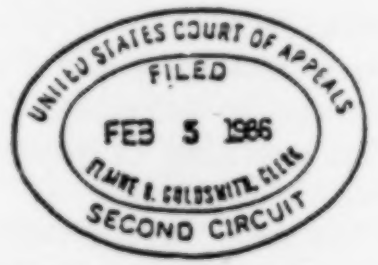
S.D.N.Y.
CONNER
84cv8904

ORIGINAL

IN RE:

SUSAN J. WEISSMAN,

Petitioner



Docket Number:

85-3078

A petition for writ of mandamus and/or prohibition having been filed,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is ~~GRANTED~~ DENIED

~~Ordered that an answer to said petition shall be filed by the~~

~~on or before~~

Further ordered that the Clerk shall serve a copy of this order on the

~~and on~~ all parties to the action in the trial court.

~~Further ordered that argument of said petition be and it hereby is set for~~

without prejudice to any legal claim that may be made by plaintiff should there be a subsequent appeal.

Dated. February 5, 1986

Wilfred Feinberg

WILFRED FEINBERG, Chief Judge

Ellsworth A. Van Graafeiland

ELLSWORTH A. VAN GRAAFEILAND

Richard J. Cardamone

RICHARD J. CARDAMONE,

Circuit Judges

APPENDIX B

RULE 28.1 LISTING

The following are parent corporations, subsidiaries, or affiliates of Kemper Financial Services, Inc.

1331 Advisers, Inc.
American Motorists Insurance Company
American Protection Insurance Company
American Underwriting Corporation
AMICO Realty Corporation
Associated Mutuals, Incorporated
Batehill, Inc.
Batehill Leasing Corporation
Bateman Eichler, Hill Richards Housing Investors, Inc.
Bateman Eichler, Hill Richards, Incorporated
Bateman Eichler, Hill Richards International, N.V. (Netherlands Antilles)
Bateman Eichler, Hill Richards Overseas, B.V. (Netherlands)
Bateman Eichler, Hill Richards Realty Services, Inc.
Bateman Eichler, Hill Richards Realty Co., Incorporated
BBC Associates, Inc.
BEHR Futures Management Corporation
BEHR International Holdings, Ltd. (Bermuda)
BEHRLEASCO, Inc.
BEHR Technology Management Corporation
BEHR Venture Management Corporation
B.E.L. Capital Corp.
Benefits Advisory Group, Inc.
Beta Systems Inc.

BJVC Energy Management Corporation
BJVC Real Estate Corporation
Blunt Ellis & Loewi Incorporated
Boettcher & Company, Inc.
Boettcher Insurance Co.
Boettcher Investment Corporation
Brokerage Clearance Services Inc.
Carnegie Administration Corp.
Carnegie Capital Management Company
Carnegie Fund Distributors, Inc.
Central Mortgage Company
Dove Associates, Inc.
Economy Fire & Casualty Company
Economy Preferred Insurance Company
Economy Premier Assurance Company
Federal Kemper Insurance Company
Federal Kemper Life Assurance Company
Federal Street Equities, Inc.
Federal Street Managers, Inc.
FKLA Realty Corporation
Forecaster Company
Gulf Texas Capital Corporation
Gulf Texas Investment Corporation
InterCapital Group
International Business Management, Inc.
Investors Brokerage Services, Inc.
Investors Fiduciary Corporation
Investors Fiduciary Trust Company
Iowa Kemper Agency
ISFA Holding Company, Ltd.
ISFA Corporation
ISFA Insurance Corporation of Delaware
KAAL PGA Sales, Inc.
Kaiser Development Company
Kemper Bedford Properties, Inc.

Kemper Capital Markets, Inc.
Kemper Conservation Industrielle, S.A. (Belgium)
Kemper Corporation
Kemper Currency, Inc.
Kemper Europe Reassurances, S.A. (Belgium)
Kemper Financial Companies, Inc.
Kemper Insurance Company Limited (Australia)
Kemper International Corporation
Kemper International Insurance Company
Kemper International Insurance Company (PTE) Limited (Singapore)
Kemper Investors Life Insurance Company
Kemper Lloyds Insurance Company
Kemper Management Company, Limited (Bermuda)
Kemper-Murray Johnstone International, Inc.
Kemper Real Estate, Inc.
Kemper Realty Corporation
Kemper Reinsurance (Bermuda) Limited
Kemper Reinsurance Company
Kemper Reinsurance London Limited
Kemper, S.A. (Belgium)
Kemper Sales Company
Kemper Service Company
KILICO Realty Corporation
Loewi Advisory Services Inc.
Loewi Financial Companies, Ltd.
Loewi Management Corp.
Lovett Mitchell Webb & Garrison, Inc.
Lovett Mitchell Webb & Garrison Government Securities, Inc.
Lumbermens Mutual Casualty Company
Mortgage Funding Corp.
Mound Agency, Inc.
Mound Agency of West Virginia, Inc.

NATLSCO Rehabilitation Management, Inc.
National Automobile and Casualty Insurance Co.
National Loss Control Service Corporation
National Loss Control Service Corp. (Canada) Ltd.
Peers & Co.
Peers Capital Corp.
Peers Holdings Inc.
PMB Corporation
Premier Assurance Center
Prescott Asset Management, Inc.
Prescott, Ball & Turben, Inc.
Prescott Capital Markets, Inc.
Prescott Holdings, Inc.
Prescott Lease Services, Inc.
Prescott Realty Services, Inc.
Prescott Travel, Inc.
The Seven Continents Insurance Company, Limited (Bermuda)
Triangle Outpost Estates, Inc.

REPLY BRIEF

No. 86-2070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JILL S. KAMEN,

Petitioner,

vs.

HONORABLE JOHN A. NORDBERG, United States District Judge of the District Court for the Northern District of Illinois, Eastern Division (KEMPER FINANCIAL SERVICES, INC. and CASH EQUIVALENT FUND, INC., real parties in interest),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

The petition for certiorari contends that mandamus is the proper method to review the denial of the constitutional right to a jury trial. The failure of the Court of Appeals to entertain the mandamus petition is alone a sufficient basis for the grant of certiorari. *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); *Glidden Company* v. *Zdanok*, 370 U.S. 530 (1962). Respondent does not seri-

ously contest this point,* but argues that the Court of Appeals decision should not be disturbed because it reached the correct substantive result in upholding the denial of plaintiff's jury demand.

However, as shown in the petition, petitioner's right to a jury trial is clear. The action is one for money damages solely, and is created and recognized in the Investment Company Act as an action at law.

Respondent advances four arguments to support its contention that no jury trial is available.

1. Respondent contends (Brief pp. 8-9) that because the action is one for breach of fiduciary duty it must be equitable in nature. However, actions for breach of fiduciary duty have long been recognized as legal claims where damages are sought. As long ago as 1844, Mr. Justice Story held in *Voss* v. *Philbrook*, 28 Fed.Cas. No. 17,010 at p. 1297 (D.Mass. 1844), that—

> "a court of equity has no right to maintain a bill for redress in cases of loss or injury occurring to the principal by the negligence or omission of duty of his agent. The appropriate remedy is at law for damages; a subject of which equity takes no direct cognizance, and deals with only as incidental to other relief."

* The cases relied upon by respondent (Brief p. 6) for the proposition that mandamus is not automatically available to review the right to jury trial are not on point. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980), involved, not the striking of a jury demand, but the ordering of a new jury trial. And *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953), involved an order granting severance and transfer of venue.

In accordance with this principle, damage actions against fiduciaries have universally been held to be actions at law and, therefore, triable by jury.*

2. Respondent contends (Brief p. 9) that congressional use of the word "court" in Section 36(b)(2) militates against jury trial. This assertion is directly contrary to this Court's holding in *Curtis* v. *Loether*, 415 U.S. 189 (1974). In that case, the Court held that there was a constitutional right to a jury trial since the relief sought—damages—is the traditional form of relief offered in the courts of law. 415 U.S. at 195-96. The right to jury trial was not at all weakened by the fact that the statute there provided, as quoted by the Court (415 U.S. at 189-190), "[t]he *court* may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attor-

* *Ross* v. *Bernhard*, 396 U.S. 531, 542 (1970) (corporation's damage claim against directors for breach of fiduciary duty); *Bruce* v. *Bohanon*, 436 F.2d 733, 736 (10th Cir. 1970), *cert. denied*, 403 U.S. 918 (1971) (damage claim for misappropriation of trade information entrusted to defendants on confidential basis); *National Union Elect. Corp.* v. *Wilson*, 434 F.2d 986, 988 (6th Cir. 1970) (corporation's damage claim against former officers and employees for breach of fiduciary duty); *Halladay* v. *Verschoor*, 381 F.2d 100, 109 (8th Cir. 1967) (damage claim against defendant who participated in wrongful transactions of testamentary trustee); *DePinto* v. *Provident Security Life Ins. Co.*, 323 F.2d 826, 836-37 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964) (corporation's damage claim against directors for breach of fiduciary duty); *Robine* v. *Ryan*, 310 F.2d 797, 798 (2d Cir. 1962) (damage claim for defendant's wrongful appropriation of plaintiff's invention in breach of confidential relationship); *Kelley* v. *Dolan*, 233 F. 635, 637 (3d Cir. 1916) (damage claim against corporate directors for breach of fiduciary duty).

neys' fees . . .". (emphasis supplied).* Utilization of the word "court" in a statute is not a shorthand way for denying the right to trial by jury.

3. Respondent argues (Brief pp. 9-10) that the use of the words "equitable standards" and "equitable action" in the committee reports demonstrates congressional intention that an action under Section 36(b) be tried without the benefit of a jury. However, there is no reason to make such an assumption. In those same committee reports relied upon by the respondent, both the Senate and the House repeatedly referred to their creation of an action for "damages". By using the term "damages" no less than four times in Section 36(b), Congress employed a well-established term of art. As this Court held in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976), quoting from the concurring opinion in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975), "[t]he starting point in every case involving construction of a statute is the language itself." Justice Frankfurter noted**:

> "Words of art bring their art with them. They bear the meaning of their habitat whether it be a phrase of technical significance in the scientific or business world, or whether it be loaded with the recondite connotations of feudalism. Holmes made short shrift of a con-

* Similarly, in *Sibley* v. *Fulton DeKalb Collection Service*, 677 F.2d 830, 832 (11th Cir. 1982), the court held, "It has been frequently determined, however, that the word 'court' used in the Act and in the remedial portions of numerous other statutes, encompasses trial by both judge and jury rather than by judge alone." (footnote omitted)

** Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L.Rev. 527, 537 (1947), cited approvingly in *Hochfelder*, 425 U.S. at 199 n.19.

> tention by remarking that statutes used "familiar legal expressions in their familiar legal sense." [21] The peculiar idiom of business or of administrative practice often modifies the meaning that ordinary speech assigns to language. And if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.
>
> [21] Henry v. United States, 251 U.S. 393, 395 (1920)" [footnote in original]

See also *Sedima* v. *Imrex Co.*, 473 U.S. 479, 53 U.S.L.W. 5034, 5037, 5038 and nn. 10 and 11 (U.S. Sup. Ct., July 1, 1985), in which the Court admonishes that heed be paid to statutory language. The term "damages" is a word of art and clearly carries with it the "soil" of jury trial.

An additional canon of statutory construction which supports petitioner's position is that courts "hesitate to impute to Congress . . . a purpose . . . to curtail a constitutional right. . . ." *Kent* v. *Dulles*, 357 U.S. 116, 128 (1958). Implying an intent to deny the right to a jury trial from ambiguous language in the legislative history runs counter to this cardinal principle of constitutional application.

In short, the familiar legal expression "damages" conveys the common law right to a jury trial. Even if Congress had some obscure intention to the contrary, legislation is the product not merely of the two houses of Congress but also one which requires the imprimatur of the President's signature. It is simply beyond belief that the President, when putting the ink to legislation authorizing an action for damages, could have imagined that he was taking away the traditional function of juries and assigning it to judges.

4. Respondent claims (Brief p. 10) that the reference in Section 44 of the Act to actions at law refers merely to the SEC's power to intervene in Section 36(b) actions. To be sure, Section 44 does authorize the Securities and Exchange Commission to intervene in a Section 36(b) action. As pointed out in the petition, however, Congress, in granting such authorization, refers to such proceedings as suits in equity and actions at law. By recognizing that a claim brought under Section 36(b) can be an action at law, the statute is clearly in juxtaposition to the district court here, which held that only a suit in equity may be brought under this Section. Section 44 thus reinforces the Congressional intent expressed by use of the word damages in Section 36(b).

Respondent contends that three Appellate Court decisions, two from the Second Circuit and one from the First Circuit, support its view that there is no right to a jury trial under Section 36(b). But of the three decisions (cited at p. 4 of respondent's brief), only the First Circuit decision in *In re Evangelist*, 760 F.2d 27 (1st Cir. 1985), so held. And that decision is erroneous not only because it relied upon its concept of legislative history rather than the statute itself, but also because it failed to consider the impact of Section 44 of the Act upon its interpretation of Section 36(b). In *In re Gartenberg*, 636 F.2d 16 (2d Cir. 1980), *cert. denied*, 451 U.S. 910 (1981), the court limited its decision to cases in which, unlike the present, equitable relief was sought. The court stated (636 F.2d at 18), "[Petitioner] alleges no damage and seeks no damages. . . . We leave for another day a determination as to the right to a jury trial of a plaintiff making a bona fide claim for damages." And in *In re Weissman* (respondent's appendix

A) the court denied mandamus expressly without prejudice to a decision on the merits.

The district court decisions cited by the respondent (Brief p. 8) merely adopted the reasoning of the district court in *Gartenberg* without any extended discussion. As pointed out above, the Court of Appeals in *Gartenberg* refused to adopt the district court's analysis of congressional intent and limited its holding to a situation where the complaint prayed for equitable relief.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted and the order below should be reversed.

Dated: New York, New York
July 27, 1987

Respectfully submitted,

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Attorney for Petitioner
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(212) 594-5300

Of Counsel:

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One Pennsylvania Plaza
New York, New York 10119

SUPPLEMENTAL

BRIEF

No. 86-2070

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

JILL S. KAMEN, Petitioner,

v.

HONORABLE JOHN A. NORDBERG (KEMPER FINANCIAL SERVICES, INC. and CASH EQUIVALENT FUND, INC., real parties in interest), Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

---

SUPPLEMENT TO RESPONDENT'S BRIEF IN OPPOSITION

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*Counsel of Record

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No. 86-2070

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

JILL S. KAMEN, Petitioner,

v.

HONORABLE JOHN A. NORDBERG (KEMPER FINANCIAL SERVICES, INC. and CASH EQUIVALENT FUND, INC., real parties in interest), Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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SUPPLEMENT TO RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Rule 22.6, Respondent Kemper Financial Services, Inc.[1/] submits this supplemental brief to call to the Court's attention a new decision not

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1/ The parent corporations, subsidiaries and affiliates of Kemper Financial Services, Inc. are listed in Appendix B to Respondent's Brief In Opposition.

available at the time the Respondent's Brief In Opposition was filed.

On December 9, 1987, the United States Court of Appeals for the Second Circuit issued an opinion in Schuyt v. Rowe Price Prime Reserve Fund, Inc., No. 87-7588 (2d Cir. Dec. 9, 1987)(per curiam) (a copy of the opinion is attached to this brief as Appendix A). In that opinion, the Second Circuit affirmed the district court's order striking the plaintiff's jury demand in an action brought under section 36(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-35(b). The Schuyt opinion is relevant to the case now pending before this Court for the following reasons:

1. The plaintiff in Schuyt, like the plaintiff here, sought repayment of allegedly excessive advisory fees. The Second Circuit held that the plaintiff was not entitled to a jury trial because the

remedy that she sought, which was essentially an accounting and restitution, was equitable in nature. App. at 4. The appellate decision in Schuyt is yet another example in the unanimous line of cases holding that no jury trial right exists under section 36(b), because it creates only equitable rights. See cases cited in Respondents' Brief In Opposition at 8.

2. Moreover, the Schuyt opinion rejects the same argument that plaintiff raises before this Court, that under the Second Circuit decision in In re Gartenberg, 636 F.2d 16, 18 (2d Cir. 1980), cert. denied, 451 U.S. 910 (1981), a plaintiff seeking "damages" under section 36(b) is automatically entitled to a jury trial. See Petition at 7, 8. The Second Circuit in Schuyt looked beyond the label of "legal damages" that the plaintiff arbitrarily attached to her prayer for relief

and correctly determined that the plaintiff's claim for repayment of excessive advisory fees was a claim for equitable relief, not a bona fide claim for "legal damages." App. at 4. Thus, to whatever extent the Second Circuit in Gartenberg may have left open the question whether a plaintiff can assert a bona fide claim for damages under section 36(b), the subsequent opinion in Schuyt makes clear that a claim for repayment of allegedly excessive advisory fees -- the same claim that plaintiff asserts in this case -- does not entitle a plaintiff to a jury trial.

3. Finally, the Schuyt case demonstrates that the Seventh Circuit was correct in holding that the extreme remedy of mandamus is not necessary in this case. The Schuyt case shows that a plaintiff has a full opportunity to raise the jury trial issue on appeal. Moreover, mandamus is

not merely unnecessary, but particularly inappropriate here because, in light of the unanimous precedent holding that a jury trial is not available under section 36(b), the court of appeals will only affirm the district court's order striking the plaintiff's jury demand, as the Second Circuit did in Schuyt.

Respectfully submitted,

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Dated: December 17, 1987
Chicago, Illinois

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 433—August Term 1987
Argued: December 7, 1987 Decided: December 9, 1987
Docket No. 87-7588

GERTRUDE BROOKS SCHUYT,

Plaintiff-Appellant,

—against—

ROWE PRICE PRIME RESERVE FUND, INC., T. ROWE PRICE ASSOCIATES, INC., CARTER O. HOFFMAN, EDWARD A. TABER, III and GEORGE J. COLLINS,

Defendants-Appellees.

Before:

FEINBERG, *Chief Judge*,
OAKES and PRATT, *Circuit Judges*.

Appeal by Gertrude Brooks Schuyt from judgment of the United States District Court for the Southern district

of New York, Robert J. Ward, J., dismissing Schuyt's complaint on the merits in an action against Rowe Price Prime Reserve Fund, Inc., T. Rowe Price Associates, Inc. and certain directors of the Fund for excessive fees under section 36(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-35(b) and other state and federal claims. Schuyt also appeals from an order of the district court granting defendants' motion to strike Schuyt's jury demand.

Affirmed.

DANIEL W. KRASNER, New York, NY (Wolf Haldenstein Adler Freeman & Herz, Stull, Stull & Brody, New York, NY, Jeffrey G. Smith, Sindy R. Udell, Robert Stull, of Counsel), *for Plaintiff-Appellant*.

DANIEL A. POLLACK, New York, NY (Pollack & Kaminsky, Martin I. Kaminsky, Henry H. Hopkins, Susan Y. Chin, of Counsel), *for Defendants-Appellees*.

PER CURIAM:

Gertrude Brooks Schuyt appeals from a judgment of the United States District Court for the Southern District of New York, Robert J. Ward, J., after a bench trial,

dismissing Schuyt's amended complaint on the merits in an action against defendants-appellees Rowe Price Prime Reserve Fund, Inc. (the "Fund"), T. Rowe Price Associates, Inc. (the "Advisor") and certain directors of the Fund having affiliations with the Advisor. Schuyt's complaint asserted claims for (1) excessive fees under section 36(b) of the Investment Company Act of 1940 (the "ICA"), 15 U.S.C. § 80a-35(b); (2) breach of fiduciary duty under Maryland law; and (3) violations of section 20(a) of the ICA, 15 U.S.C. § 80a-20, and Rule 20a-1 promulgated thereunder, 17 C.F.R. § 270.20a-1, for alleged material omissions from the Fund's proxy statements. We affirm the judgment of the district court substantially for the reasons stated in Judge Ward's thorough opinion, reported at 663 F. Supp. 962 (S.D.N.Y. 1987).

Schuyt also appeals from an order of the district court dated April 1, 1987, granting defendants' motion to strike Schuyt's jury demand. Schuyt argues that she is entitled to a jury trial on both her section 36(b) and section 20(a) claims since both claims seek "legal damages." We disagree. The mere fact that Schuyt has designated the relief she seeks as "damages" does not mean that she is automatically entitled to a jury trial. As Judge Friendly noted in Securities and Exchange Commission v. Commonwealth Chemical Securities, Inc., 574 F.2d 90, 95 (2d Cir. 1978):

> [N]ot all money claims are triable to a jury. . . . And '[w]hen restitution is sought in the form and in the situations allowed in equity prior to the rules or authorized by valid statutes there is no right to a jury trial'

(citations omitted). See also Maldonado v. Flynn, 477 F. Supp. 1007, 1011 (S.D.N.Y. 1979) (claims filed under the Securities Exchange Act of 1934 for proxy violations were essentially equitable in nature and thus plaintiff was not entitled to a jury trial). Appellant stresses that in In re Gartenberg, 636 F.2d 16, 18 (2d Cir. 1980), cert. denied, 451 U.S. 910 (1981), this court left open the general question of whether a plaintiff could assert a "bona fide claim for damages" under section 36(b) entitling such plaintiff to a jury trial. However, the particular plaintiff in *In re Gartenberg* had sought what was in essence an equitable disgorgement and an accounting, and under those facts the court determined that a jury trial was not available. Schuyt's claim is similar to the claim made in *In re Gartenberg* under section 36(b) and is essentially an equitable one. Schuyt seeks repayment to the Fund of the excessive advisory fees paid; this is essentially an equitable remedy, not a "bona fide claim for damages." Similarly, Schuyt's claim under section 20(a), in essence, seeks rescission of the advisory agreements between the Fund and the Advisor and restitution and is thus equitable in nature.

The judgment of the district court is affirmed.

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OPINION

SUPREME COURT OF THE UNITED STATES

JILL S. KAMEN *v.* JOHN A. NORDBERG, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS (KEMPER FINANCIAL SERVICES, INC., ET AL., REAL PARTIES IN INTEREST)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 86–2070. Decided March 7, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

The issue here is when mandamus relief will be available to a party who claims that the District Court wrongly deprived him of the right to a jury trial. Petitioner is a shareholder in a mutual fund and brought a derivative suit against the two companies that administer the fund, alleging breach of fiduciary duty under § 36(b) of the Investment Company Act of 1940, 15 U. S. C. § 80a–35(b). The District Court granted defendants' motion to strike petitioner's demand for a jury trial on this claim, and petitioner sought mandamus from the Court of Appeals to compel the District Court to honor his demand for a jury trial. The Seventh Circuit denied relief in an order, *Kamen* v. *Kemper Financial Services, Inc.*, Civ. Action No. 87–1455 (CA7, Apr. 13, 1987), citing its prior decision in *First Nat'l Bank* v. *Warren*, 796 F. 2d 999 (CA7 1986).

In *Warren*, the Seventh Circuit held that mandamus will lie to enforce a party's demand for a jury trial only when, first, the party's right to a jury trial is clear and indisputable and, second, the party has no other adequate means to attain the relief he desires. 796 F. 2d, at 1006. The second point is especially critical because it will prevent interlocutory review of many requests for a writ of mandamus to direct the granting of a jury trial, as in many cases the petitioning party can seek this same relief on appeal from the ultimate resolu-

tion of the case in the trial court. This decision conflicts with the decisions of other Courts of Appeals, which hold that mandamus relief is available to review an order denying a claimed right of trial by jury, and that a proper petition for mandamus in these circumstances obliges the Court of Appeals to address the merits of the claimed right to a jury trial. *In re Union Nacional de Trabajadores*, 502 F. 2d 113, 115–116 (CA1 1974), vacated on other grounds, 527 F. 2d 602 (1975); *Lee Pharmaceuticals* v. *Mishler*, 526 F. 2d 1115, 1116–1117 (CA2 1975) *(per curiam)*; *Eldredge* v. *Gourley*, 505 F. 2d 769, 770 (CA3 1974); *General Tire & Rubber Co.* v. *Watkins*, 331 F. 2d 192, 194 (CA4), cert. denied, 377 U. S. 952 (1964); *Black* v. *Boyd*, 248 F. 2d 156, 159–161 (CA6 1957); *In re Vorpahl*, 695 F. 2d 318, 319 (CA8 1982); *Owens-Illinois, Inc.* v. *U. S. District Ct.*, 698 F. 2d 967, 969 (CA9 1983); *In re Zweibon*, 565 F. 2d 742, 745–746 (CADC 1977) *(per curiam)*. It may also be inconsistent with this Court's prior decisions in *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959), and *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469 (1962), which emphasize the responsibility of the Courts of Appeals to grant mandamus relief where it is necessary to protect the constitutional right to trial by jury. I would grant certiorari to resolve the split among the Circuits on this issue.